IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

JACK FOSTER OUTTEN,	)	
	)	
	)	
Petitioner,	)	
	)	
v.	)	Civ. No. 98-785-SLR
	)	
ROBERT E. SNYDER and M. JANE BRADY,	)	
	)	
	)	
Respondents.	)	

John P. Deckers, Esquire, Wilmington, Delaware and Ricardo Palacio, Esquire, Ashby & Geddes, P.A., Wilmington, Delaware. Counsel for Petitioner.

Loren C. Meyers, Esquire, and Thomas E. Brown, Esquire, Department of Justice, Wilmington, Delaware. Counsel for Respondents.

OPINION

Dated: March 31 , 2004
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

On January 21, 1992, Jack Foster Outten, Jr. ("petitioner") and two co-defendants, Steven Shelton and Nelsen Shelton (the "Sheltons"), were indicted for first-degree intentional murder, first-degree felony murder, first-degree conspiracy, first-degree robbery, and possession of a deadly weapon during the commission of a felony. All three were tried before the same jury in the Delaware Superior Court in and for New Castle County and, on February 24, 1993, were found guilty as to all counts of the indictment after a five week jury trial. In a separate penalty hearing, the jury recommended that petitioner and the Sheltons be sentenced to death. The Superior Court accepted this recommendation and, on April 30, 1993, the defendants were sentenced to death by lethal injection.[1]

On December 28, 1998, petitioner filed a pro se application for habeas corpus relief, a motion to stay the state court proceedings pursuant to 28 U.S.C. § 2251, and a motion to proceed in forma pauperis. (D.I. 1, 2, 3) On December 29, 1998, the Attorney General answered petitioner's motion to stay. (D.I. 4) The court granted a stay of execution and petitioner's motion to proceed in forma pauperis on January 11, 1999. (D.I. 7) On October 2, 1999, the court entered an order appointing counsel

[1]Nelson Shelton waived all further appeals and/or other post-conviction remedy and was executed by lethal injection on March 17, 1995.

for petitioner and setting forth a schedule for counsel to file a first amended petition.

On October 4, 1999, petitioner filed his first amended application for habeas corpus relief to supplement and to clarify his grounds for relief, a motion to expand the record with the expert report of a mitigation specialist, and a motion for an evidentiary hearing regarding ineffective assistance of counsel during several stages of the state court proceedings.[2] (D.I. 28, 29, 31) Respondents answered the first amended petition on January 31, 2000. (D.I. 35)

On August 31, 2000, petitioner motioned the court for leave to file a second amended application to correct the identity of the respondent[3] and to add two additional counts. (D.I. 55) Petitioner also motioned the court for an evidentiary hearing to expand the record as to: (1) claims relating to the prosecution's primary witness against petitioner and his co-defendants; (2) a claim relating to trial counsel's failure to present a coherent case of mitigation at sentencing; and (3) a claim relating to

---

[2]Petitioner's original motion for an evidentiary hearing was terminated on an unknown date.

[3]When petitioner initially filed his application for writ of habeas corpus, he was incarcerated at the Sussex Correctional Institution in Georgetown, Delaware. The warden of the Sussex Correctional Institution is Rick Kearney. Petitioner, consequently, named Mr. Kearney as one of the respondents on his application. Since his original application, petitioner has been moved to the Delaware Correctional Center where Robert Snyder serves as warden.

petitioner's allocution at sentencing. (Id.) The court stayed petitioner's motion for an evidentiary hearing on September 10, 2001 pending decision of the Third Circuit in Riley v. Taylor, 277 F.3d 261 (3d Cir. 2001). (D.I. 76) On March 28, 2002, the court granted petitioner's motion for an evidentiary hearing with respect to his claim that trial counsel rendered constitutionally ineffective assistance by failing to investigate the background of the prosecution's primary witness prior to trial. The court denied petitioner's motion for an evidentiary hearing as to all other claims. (D.I. 78, 79) On April 11, 2002, the court granted petitioner's motion to amend his application for habeas relief to include a claim of ineffective assistance of counsel for failure to properly investigate and adequately prepare for cross-examination of prosecution's primary witness against petitioner and his co-defendants and ordered an evidentiary hearing on this issue to be held on June 25, 2002. (D.I. 80) The court also granted petitioner's motion for leave to file a second amended application on June 25, 2002. (D.I. 88)

On September 17, 2002, the court stayed the instant proceeding pending a decision by the Delaware Supreme Court concerning the impact of the United States Supreme Court decision in Ring v. Arizona, 536 U.S. 584 (2002), on the Delaware Death Penalty Statute. The Delaware Supreme Court addressed these issues in Brice v. State, 815 A.2d 314 (Del. 2003) and

Garden v. State, 815 A.2d 327 (Del. 2003), decisions issued, respectively, on January 13, 2003 and January 24, 2003.[4] Petitioner filed a second motion for leave to file a third amended application to add claims under Ring on April 2, 2003. (D.I. 102) Pursuant to notification by the parties of these decisions, the court arranged a status conference with the parties on April 4, 2003. (D.I. 104) During this teleconference, the court granted petitioner's motion for leave to filed a third amended application. (Id.) Petitioner filed this third amended application on April 4, 2003. (D.I. 103)

Presently before the court is petitioner's third amended application for habeas corpus relief. For the following reasons, the court denies the requested relief.

[4]The Delaware Death Penalty Statute was amended in 2002 following the Ring decision. The Brice decision focused on the constitutionality of the amended version of the Delaware Death Penalty Statute.

II. BACKGROUND[5]

A. The Murder to Wilson Mannon

On January 11, 1992, petitioner, the Sheltons, and Christine Gibbons spent the afternoon drinking beer at Gibbons's home in Newark, Delaware. The Sheltons are brothers, and petitioner is their cousin. Gibbons was Nelson Shelton's girlfriend. Petitioner purchased the beer using his unemployment check.

At dusk, after drinking approximately one and one-half cases of beer, the four drove in Nelson Shelton's two-door Camero to Clemente's Bus Stop, a local tavern located on U.S. Routes 13 and 40 in Wilmington, Delaware. On the way to the bar, they discussed a plan for Gibbons to pose as a prostitute and lure men out of the bar. Petitioner and the Sheltons planned to rob the men once outside.

After arriving at Clemente's, the four continued to drink beer. A patron came over to the four and spoke with petitioner about buying drugs. Petitioner told the patron that he could obtain drugs for him. At this point, the four left Clemente's

---

[5]The court draws the following factual background from a number of sources: (1) the Delaware Supreme Court decision regarding petitioner and Steven Shelton's automatic appeal, Outten v. State, 650 A.2d 1291 (Del. 1994)(hereinafter "Outten I"); (2) the Delaware Superior Court's decision on post-conviction relief, State v. Outten, 1997 WL 855718 (Del. Super. 1997)(hereinafter "Outten II"); (3)the court's memorandum opinion (D.I. 78); (4) the court's independent review of the record of the state court proceedings; and (5) the parties' instant briefs relating to petitioner's third amended application for writ of habeas corpus.

with the patron and drove to a building in Stanton where Nelson Shelton formerly worked. Petitioner and the patron exited the car and walked behind the building. Petitioner returned with twenty five dollars in cash that he took from the patron.

The four then drove to Hamil's Pub in Elsmere where petitioner used the money to buy more alcoholic drinks for the group. Nelson Shelton and Gibbons argued at Hamil's Pub because, according to Gibbons, Nelson was jealous that she danced with Steven Shelton and petitioner. Gibbons testified that Nelson punched her in the stomach during the course of their argument.

From Hamil's Pub, petitioner suggested going to another bar known as Fat Boys or the Green Door in New Castle. Gibbons testified that she continued to argue with Nelson Shelton in the parking lot of the Green Door while Steven Shelton and petitioner entered the bar. Eventually, Gibbons went inside and sat at the bar. She initiated a conversation with sixty-two year old Wilson "Willie" Mannon, the murder victim. Mannon was wearing a baseball hat and several pieces of gold jewelry. He was also drinking heavily. Mannon bought drinks for Gibbons and danced with her. Meanwhile, petitioner and the Sheltons played pool.

Between midnight and 1:00 a.m., a barmaid observed petitioner make a telephone call. Petitioner telephoned Karen Julian, his girlfriend, and asked her to pick him up from the Green Door. Petitioner said that he did not want to go with the

others. Julian refused.

Around the time of "last call," petitioner and the Sheltons joined Mannon and Gibbons. According to Gibbons, Mannon had run out of money, but the group was served a final round of drinks anyway. After the bar closed at 1:00 a.m., Gibbons left with Mannon followed by the three defendants. Mannnon talked with the four in the parking lot and then left with them in the Camero. Gibbons sat in the front seat with Nelson Shelton. Petitioner, Steven Shelton, and Mannon rode in the back seat.

Nelson Shelton initially drove to an isolated spot on East Seventh Street in Wilmington, but ended up on a desolate stretch of Plant Street, also in Wilmington. Mannon's body was discovered there on the morning of January 12, 1992 at approximately 11:00 a.m.. Mannon was lying on his back with his legs crossed. The top of his head was completely smashed. Blood, brains, and skull matter were lying around his head. Mannon's wallet was empty. Loose change was found near the body, and identification cards were scattered on the ground. A broken ballpeen hammer was found a few feet from the body. The head of the hammer was located on the far side of a nearby fence.

B. Gibbons Contradictory Statements

Over the course of the investigation and trial, Gibbons gave multiple accounts of the events leading to Mannon's murder. On the morning of January 12, 1992, Nelson Shelton and Gibbons were

stopped by the New Castle County Police and taken to police headquarters. The County Police sought to question Nelson on a charge unrelated to the incident involving Mannon. The County Police also questioned Gibbons.[6] Thinking that she had been picked up in connection with Mannon's murder, Gibbons spoke about the events of the previous night. Gibbons said that petitioner and Steven Shelton kicked Mannon, but was adamant that Nelson Shelton was not involved. Gibbons also told police about a sink-like object that was used to hit Mannon and that such object had been later discarded along Interstate 95 after the murder. She informed the County Police that Mannon had been decapitated. Near the end of the interview, the County Police became aware that the Wilmington Police had found Mannon's body.

After a break from County Police questioning, Gibbons was interviewed by Wilmington Police detectives.[7] Gibbons told the Wilmington Police that she had been at the Green Door where she met Mannon. She said that Mannon bought drinks for her. Gibbons said that she saw Mannon leave the bar after her and that petitioner invited him to join them. Mannon got into the back seat of Nelson's car and left with them. In the area near the Up

[6]The County Police videotaped its interview with Gibbons. This videotape was played for the jury at trial.

[7]The Wilmington Police also videotaped its interview with Gibbons. This videotape was likewise played for the jury at trial.

and Creek Bar, Mannon got out or was dragged out of the car. Gibbons stated that petitioner hit Mannon with a hammer and Steven Shelton kicked him. Petitioner then picked up a kitchen sink and hit Mannon on the head about twenty times. Gibbons insisted that Nelson Shelton did not participate in the murder. After leaving the murder scene, she explained that Nelson stopped the car and "they" removed the sink from the trunk and threw it along Interstate 95. Gibbons said that the sink, when disposed, may have had brain tissue adhered to it from Mannon's head. She informed the Wilmington Police that the four returned to her house, showered, and washed their clothes and shoes with bleach. She stated that Julian arrived to pick up petitioner and Steven Shelton. Nelson cleaned the inside of the Camero with a wash cloth, which he later discarded. Gibbons claimed that she attempted to call a friend to tell her about the events. She said that Nelson Shelton discovered her call, became angry, ripped the telephone from the wall, and hit her. She said that Nelson took her to petitioner's house to be watched by petitioner and Julian.[8]

On January 13, 1992, a day after the murder, Gibbons contacted her social worker, Sandra Nyce. Gibbons told Nyce that

---

[8]After leaving Gibbons with petitioner and Julian, Nelson Shelton raped an 85-year old woman. He also tied up the victim's son, who was around 60-years old, and searched the victim's purse. Gibbons, however, did not learn of the rape until after her statements to both the County and Wilmington Police.

all three defendants took turns hitting Mannon and that the men laughed about it as if it were a joke.

In October 1992, Gibbons submitted to a videotaped deposition to preserve her statements for trial. Gibbons testified that Steven Shelton became ill while the group drove from the Green Door with Mannon. She said that Nelson, however, refused to stop the car. After arriving at the murder site, she stated that Steven Shelton went to some bushes to "get sick." At the same time, she said that petitioner and Nelson Shelton shoved and hit Mannon. She insisted that she asked them to leave Mannon alone, but that Nelson reached into the car and told her to shut up. She said that Nelson also retrieved a ballpeen hammer and used it to strike Mannon on the back of the head causing him to fall. When he fell, he tripped Nelson causing the hammer to fall and break. She testified that Nelson then stood and repeatedly instructed petitioner to "finish it." Petitioner picked up a sink-shaped object from the side of the road and struck Mannon approximately ten times between his nose and the top of his head. Gibbons testified that Steven Shelton returned from the woods and nudged Mannon to see if he were alive. Nelson Shelton removed Mannon's rings. Petitioner and the Sheltons then passed around Mannon's wallet. Gibbons testified that petitioner and Nelson Shelton put the sink-like object in the trunk of the Camero. Gibbons stated that Nelson stopped the car in route to her home,

and petitioner removed the sink and threw it along Interstate 95. The four showered at her house, washed their clothes, and bleached their shoes. Nelson cleaned the car. Petitioner put on a pair of Gibbons's Harvard sweat shorts, and Steven Shelton wore a pair of her sweat pants. About 3:00 or 4:00 a.m., petitioner and Steven Shelton wanted to leave Gibbons's house and needed a ride. They called Julian, and she came to transport them. Gibbons claimed that she blamed Steven Shelton, instead of Nelson Shelton, at County Police headquarters on January 12th because she loved and feared Nelson. In this regard, Gibbons revealed that she was five to six months pregnant at the time of the murder and that Nelson was the father. She further stated that Nelson had raped her on a prior occasion.

On February 19, 1992, Gibbons visited Steven Shelton's lawyer, John Willard, at his office.[9] She implicated Nelson in place of Steven as a participant in Mannon's murder. She also claimed that Steven fathered the baby that she had since aborted.[10] She said that she engaged in a one-night stand with Steven and that Nelson was seeing other women besides her during their relationship. She told Steven's counsel that she

[9]Mr. Willard taped his conversation with Gibbons. The tape was played for the jury at trial.

[10]On a separate occasion, Gibbons reported that she lost the baby due to the beating she sustained from Nelson on the night of the murder. (See D.I. 57 at A-215)

implicated Steven in her earlier statements because she was afraid of Nelson and that he threatened to rape and kill her if she talked about the murder.

During her initial appearance at trial in January 1993, Gibbons testified consistent with her October 1992 deposition, incriminating only petitioner and Nelson Shelton in the murder. After completing her testimony, Gibbons subsequently asked to retake the witness stand because she claimed that she had lied during her previous testimony. The trial judge permitted her to recant any prior testimony. Her new testimony mirrored her prior one, except that she implicated Steven directly in the beating. She testified that "they all three started beating on him" and that she saw Steven kick and punch Mannon in the face. Gibbons stated that she gave a different version of the events earlier at trial because she was confused about her personal feelings toward the Sheltons. Gibbons also stated that she initially told police that Nelson was not involved because she cared for him and that he told her to testify that he was not involved in the murder. Additionally, she said that Steven told her to say he had gone into the woods at the time of the murder. Gibbons explained that she sought to correct her testimony because it was unfair to blame only petitioner and Nelson Shelton when Steven Shelton actually also participated in the murder.

C. Petitioner's Penalty Hearing[11]

The penalty hearing was held on March 3 to 5, 1993. At the outset, counsel for both petitioner and Steven Shelton made opening statements. Petitioner's counsel told the jury its decision was simple – life or death. They also stated that they were "here to beg for the life our client[]." Steven Shelton's counsel stated, in contrast, that his client instructed him not to beg for his life.

The State proceeded to present evidence and witnesses concerning petitioner's and Steven's past criminal history. This evidence included petitioner's house burglary conviction; seven convictions for non-violent crimes including forgery, issuing bad checks, a misdemeanor theft, a felony theft, and criminal impersonation; his family court record; and his probation violations. Shifting to Steven, evidence was introduced about his robbery and rape convictions; assault of a fellow inmate while incarcerated on the rape conviction; and arrests for driving under the influence and for robbery in the first degree.

Thereafter, petitioner and Steven opted to present mitigation evidence to the jury. Proceeding first, petitioner called his mother, two sisters, brother, friend, and Julian to

---

[11]Petitioner and the Sheltons were brought before the jury in the same penalty hearing. The court does not include that portion of the proceeding pertaining to Nelson Shelton since it is not relevant to issues in the application at bar.

testify on his behalf. Several of these witnesses explained petitioner's tumultuous relationship with his father. His father was beaten during a 1974 robbery and suffered communications problems as a result. They stated that petitioner was abused by his father as a child, but that he later cared for his father until his death. Julian also explained the impact of their infant's death on petitioner. His mother described some of petitioner's criminal activity, including an assault on his sister.

In allocution, petitioner began by telling the jury that he was twenty-six years old and that he desired to be truthful in his statements to them. He described his childhood in a close-knit family, but claimed that he was "semi-abused." He stated that his father was not affectionate, was abusive when drunk, and "chastened" him, causing him to run away. He explained that he lived in foster care, but left when he was accused of stealing from his foster family. He also reviewed his criminal record, describing himself as "mischievous." He noted that his record covered seventeen pages and 146 charges, but that many of the charges did not result in convictions. He also pointed out to the jury that his convictions were for non-violent offenses. Petitioner stated that he started drinking as a teenager and then turned to drugs at age twenty to conceal his problems. He also said that he has always been a kleptomaniac. He discussed

learning carpentry as a trade in ninth grade and quitting school after his junior year in high school. He said that he continued his education while incarcerated and had a regular roofing job. He started his own roofing company to work on weekends. Petitioner admitted, however, that he stole to buy the tools for his company. Petitioner next stated that he had appeared before a judge in Superior Court shortly before Mannon's murder because he had been expelled from a drug treatment program. He told the judge that he was not in the program to become a snitch. Petitioner further described his relationship with Julian, how they met, and the events surrounding his first child's death. He talked about his second child with Julian and that it hurt not to be able to hold him and spend time with him. He expressed the desire to watch his second child grow. Petitioner spoke about his father and the help he gave to him on his deathbed. Finally, he closed by describing himself as full of caring, sharing, honesty, and love, not as cold, calculating, ruthless, or heartless. He professed that his good qualities outweighed his bad ones and asked the jury to give him "the benefit of the doubt" and to distinguish "right from wrong."

After petitioner concluded, Steven called his brother and two half-sisters as witnesses. They described Steven's difficult childhood and family structure. His father suffered a serious work accident which caused him to lose both legs. Nevertheless,

his father continued to work at a boat yard to support the family. His father also drank heavily and abused Steven along with the other children. One half-sister testified that when Steven was ten or eleven, he would have to go to bars in the middle of the night, even on week nights during the school year, to bring their father home in his wheelchair. She also shared that their father took Steven to work with him, drank at the boat yard, and became so intoxicated that he was not aware that Steven, who was significantly underage, drank with him. His other half-sister stated that Steven was close with her children and showed them much affection. She also described him as strong, consistent, and responsible. In this regard, she stated that he assisted another sibling with home repairs and helped his mother pay her bills.

Steven then allocuted to the jury. He stated:

> Ladies and gentlemen of the jury, I stand before you not to plead for my life. I feel that's wrong and improper and basically disrespectful to the victim's family and to mine. The State has painted a picture, and that picture is not very pretty, pertaining to me and my co-defendants. And I would just like to present to the jury a different side or a different meaning to Steven Shelton. The State has pictured me as being a monster, as being a rapist, as being a violent individual, but as you heard from my family, that's not so. The State only presents one side of the picture. There's two sides to every story. And the State just presents a negative side. The jury has found me guilty of these allegations, and now it's the jury's turn to render a verdict. And that verdict is either life in jail or death. Again, I'm not here to plead for my life, but just ask the jury to be fair in their decisions. That's all I have to say.

Outten II, 1997 WL 855718 at *25-*26.

In accordance with the sentencing procedure prescribed in the Delaware Death Penalty Statute in effect at the time of the penalty hearing for first-degree murder, 11 Del. C. § 4204 enacted on November 1, 1991, the jury unanimously decided that the evidence showed beyond a reasonable doubt the existence of three statutory aggravating circumstances: (1) the murder was committed during a robbery; (2) the murder was committed for pecuniary gain; and (3) the victim was more than sixty-two years old. See 11 Del. C. § 4209(e)(1)(j), (o), (r) (1991). By a vote of 7 to 5 as to petitioner and a vote of 8 to 4 as to Steven Shelton, the jury found by a preponderance of the evidence that the statutory and non-statutory aggravating circumstances found to exist outweighed the mitigating circumstances presented by petitioner and Steven Shelton. Accordingly, the jury recommended a death sentence for both petitioner and Steven Shelton. After considering the jury's recommendation, the judge independently found that the prosecution had established beyond a reasonable doubt the existence of three statutory aggravating circumstances. The judge likewise independently concluded that the aggravating circumstances outweighed the mitigating circumstances and, on April 30, 1993, sentenced both petitioner and Steven Shelton to death for Mannon's murder.

D. Petitioner's Automatic Appeal

On automatic appeal pursuant to 11 Del. C. § 4209(g), petitioner challenged his conviction on three grounds: (1) the Superior Court erred by failing to sever the trials; (2) the State's peremptory challenge of a certain venire member violated Batson v. Kentucky, 476 U.S. 79 (1976); and (3) the Superior Court erred by not permitting him to introduce extrinsic evidence in support of the credibility of one of his witnesses at trial.[12] Outten I, 650 A.2d at 1293. After reviewing the record and applicable authorities, on December 23, 1994, the Delaware Supreme Court affirmed both the conviction and sentence for petitioner and Steven Shelton. (Id.) The Delaware Supreme Court found that the Superior Court had not committed any error during the jury trial. (Id.) Petitioner was re-sentenced to death on January 5, 1995. (See D.I. 28 at 6)

E. Petitioner's State Post-Conviction Proceedings

Pursuant to Superior Court Criminal Rule 61, petitioner filed an amended motion for post-conviction relief with the Delaware Superior Court on grounds of ineffective assistance of

[12]Petitioner presented Lisa DeLude ("DeLude") as a witness. She testified that Gibbons confessed to her that she had killed Mannon. On cross-examination, the State attacked her credibility by questioning why she had not come forward earlier with this confession. On redirect, petitioner's counsel attempted to introduce evidence that DeLude, in fact, had placed a call to Nelson Shelton's attorney. The trial court disallowed the introduction of such evidence.

counsel in both the trial and penalty phases. Specifically, petitioner alleged that his counsel erred in six ways: (1) failure to conduct an adequate pretrial investigation, especially with regard to Gibbons; (2) failure to move for severance of the guilt phase; (3) incorrect advice about whether to take the witness stand; (4) failure to move for severance of the penalty phase; (5) inadequate investigation of mitigating evidence and failure to have him examined by mental health professionals and present such evidence; and (6) failure to move for a new trial. Petitioner also sought an evidentiary hearing before the Superior Court on his post-conviction claims. By letter to counsel dated November 6, 1996, the Superior Court determined that an expansion of the record pursuant to Superior Court Criminal Rule 61(g) was necessary to consider petitioner's motion. The Superior Court indicated that the expansion could be accomplished by affidavit and requested responses to twelve questions posed to petitioner's trial counsel. The questions concerned the following subjects: (1) the list of witnesses for the penalty hearing that petitioner alleges was given to counsel and not investigated, discussions about such witnesses with petitioner, and decisions made by counsel about which witnesses to produce; (2) the efforts, if any, to investigate petitioner's court and school records; (3) any decision made by counsel on how to present petitioner at the penalty hearing; (4) whether there was a conscious decision to

sever the penalty hearing; (5) whether advice was given to petitioner not to testify during the guilt phase; (6) the substance of petitioner's testimony had he elected to testify; (7) whether counsel was aware of petitioner's telephone call from the bar to his girlfriend the night of the murder; (8) whether counsel had discussed petitioner's relationship with his father beyond the last year of his father's life; (9) whether there was a conscious decision not to have a psychiatric examination of petitioner for use during the penalty hearing; (10) what role petitioner took in any of the above decisions; (11) the reasons counsel did not join in Nelson Shelton's motion to sever the guilt phase; and (12) whether counsel was aware that petitioner cashed a check on the night of the murder at a location other than the one testified to by Gibbons. Trial counsel responded by affidavit one month later. Petitioner and the State, in turn, filed responses to trial counsel's affidavit. Based upon all responses, the Superior Court thereafter concluded on December 22, 1997 that an evidentiary hearing was not warranted. The Superior Court also denied petitioner's amended motion for post-conviction relief. Outten II, 1997 WL 855718 at *92.

F. Petitioner's Appeal of the State Post-Conviction Proceedings

Petitioner challenged the Superior Court's decision before the Delaware Supreme Court. Finding that the Superior Court did not abuse its discretion in deciding petitioner's post-conviction

claims of ineffective assistance of counsel, the Delaware Supreme Court affirmed the Superior Court's decision on November 19, 1998 and remanded the case to the Superior Court. See Outten v. State, 720 A.2d 547, 550 (Del. 1998) (hereinafter "Outten III"). The Superior Court reinstated the sentence of death and set the date of execution for March 18, 1999.

III. STANDARD OF REVIEW

A. Exhaustion

Before seeking habeas relief from a federal court, a petitioner in state custody pursuant to a state court judgment must satisfy the procedural requirements contained in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). This section states:

> An application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –
> (A) the applicant has exhausted the remedies available in the courts of the State; or
> (B)(I) there is an absence of available State corrective process; or
> (B)(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1). Grounded on principles of comity, the requirement of exhaustion of state court remedies ensures that state courts have the initial opportunity to review federal constitutional challenges to state convictions. Werts v. Vaughn, 228 F.3d 178, 192 (3d Cir. 2000). If a § 2254 petition includes any unexhausted claims, it "must be dismissed without prejudice

for failure to exhaust all state created remedies." Sullivan v. State, 1998 WL 231264, *14 (D. Del. 1998)(quoting Doctor v. Walters, 96 F.3d 675, 678 (3d Cir. 1996)).

To satisfy the exhaustion requirement, the state prisoner must give "state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." O'Sullivan v. Boerckel, 526 U.S. 838, 844-45 (1999). This means that a petitioner must demonstrate that the claim was fairly presented to the state's highest court, either on direct appeal or in a post-conviction proceeding. See Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997)(citations omitted); Coverdale v. Snyder, 2000 WL 1897290, *2 (D. Del. 2000). If the petitioner raises the issue on direct appeal, then he does not need to raise the same issue again in a state post-conviction proceeding. Lambert, 134 F.3d at 513; Evans v. Court of Common Pleas, Delaware County, Pennsylvania, 959 F.2d 1227, 1230 (3d Cir. 1992)(citations omitted).

To "fairly present" a federal claim for purposes of exhaustion, a petitioner must present to the state's highest court a legal theory and facts that are "substantially equivalent" to those contained in the federal habeas petition. Doctor, 96 F.3d at 678. It is not necessary for the petitioner to identify a specific constitutional provision in his state

court brief, provided that "the substance of the ... state claim is virtually indistinguishable from the [constitutional] allegation raised in federal court." Santana v. Fenton, 685 F.2d 71, 74 (3d Cir. 1982)(quoting Bisaccia v. Attorney Gen., 623 F.2d 307, 312 (3d Cir. 1980)). A petitioner may assert a federal claim without explicitly referencing a specific constitutional provision by: (1) relying on pertinent federal cases employing a constitutional analysis; (2) relying on state cases employing a constitutional analysis under similar facts; (3) asserting a claim in terms so particular as to call to mind a specific right protected by the United States Constitution; or (4) alleging a pattern of facts well within the mainstream of constitutional litigation. McCandless v. Vaughn, 172 F.3d 255, 261 (3d Cir. 1999); Evans, 959 F.2d at 1231. Furthermore, the state court does not have to actually consider or discuss the issues in the federal claim, provided that the petitioner did, in fact, present such issues to the state court. See Swanger v. Zimmerman, 750 F.2d 291, 295 (3d Cir. 1984).

B. Procedural Default

A petitioner's failure to exhaust state remedies will be excused if there is no available state remedy. Lines v. Larkins, 208 F.3d 153, 160 (3d Cir. 2000); see Teague v. Lane, 489 U.S. 288, 297-98 (1989). However, even though these claims are treated as exhausted, they are procedurally defaulted. Lines,

208 F.3d at 160. A federal court may not consider the merits of procedurally defaulted claims unless the petitioner demonstrates either cause for the procedural default and actual prejudice or a "fundamental miscarriage of justice." McCandless, 172 F.3d at 260; Coleman v. Thompson, 501 U.S. 722, 750-51 (1999); Caswell v. Ryan, 953 F.2d 853, 861-62 (3d Cir. 1992).

To demonstrate cause for a procedural default, a petitioner must show that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Murray v. Carrier, 477 U.S. 478, 488 (1986). A petitioner can demonstrate "actual prejudice" by showing "not merely that the errors at . . . trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Id. at 494. If the petitioner does not allege cause for the procedural default, the federal court does not have to determine whether the petitioner has demonstrated actual prejudice. See Smith v. Murray, 477 U.S. 527, 533 (1986).

Alternatively, a federal court may excuse procedural default if the petitioner demonstrates that failure to review the claim will result in a fundamental miscarriage of justice. Edwards v. Carpenter, 529 U.S. 446 (2000); Wenger v. Frank, 266 F.3d 218, 224 (3d Cir. 2001). In order to demonstrate a "miscarriage of justice," the petitioner must show that a "constitutional

violation has probably resulted in the conviction of one who is actually innocent." Murray, 477 U.S. at 496. A petitioner establishes "actual innocence" by proving that no reasonable juror would have voted to find him guilty beyond a reasonable doubt. Sweger v. Chesney, 294 F.3d 506, 523-24 (3d Cir. 2002).

C. Review Under the AEDPA

A federal district court may consider a habeas petition filed by a state prisoner only "on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Before the court can reach the merits of such a petition, the court must first determine whether the requirements of the AEDPA are satisfied. Section 2254(d) states, in pertinent part, that:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in the State court proceeding unless the adjudication of the claim –
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Based upon the language of § 2254(d)(1), a federal court cannot grant a writ of habeas corpus on a claim that was adjudicated in state court on the merits unless it finds that the state court decision either: (1) was contrary to established federal law; or (2) involved an unreasonable

application of clearly established federal law. See Williams v. Taylor, 529 U.S. 362, 412 (2000).

The Third Circuit requires federal courts to utilize a two-step analysis when considering whether the state court decision falls into either catagory. Matteo v. Superintendent, SCI Albion, 171 F.3d 877, 880 (3d Cir. 1999) (en banc); see also Werts, 228 F.3d at 197. The first step requires federal courts to identify the applicable Supreme Court precedent and then determine whether the state court decision is "contrary to" this precedent. Matteo, 171 F.3d at 888. "Relief is appropriate only if the petitioner shows that the 'Supreme Court precedent requires an outcome contrary to that reached by the relevant state court.'" Werts, 228 F.3d at 197 (quoting O'Brien v. Dubois, 145 F.3d 16, 24-25 (1st Cir. 1998)). The petitioner cannot merely demonstrate "that his interpretation of Supreme Court precedent is more plausible than the state court's; rather, the petitioner must demonstrate that Supreme Court precedent requires the contrary outcome." Matteo, 171 F.3d at 888. Under this standard, habeas relief cannot be granted if the federal court merely disagrees with a state court's reasonable interpretation of the applicable precedent. Id.

If the federal court concludes that the state court adjudication is not contrary to the Supreme Court precedent, then the court must determine whether the state court judgment rests upon an objectively unreasonable application of clearly

established federal law, as determined by the United States Supreme Court. Id. at 880. This analysis involves determining "whether the state court decision, evaluated objectively and on the merits, result[s] in an outcome that cannot reasonably be justified. If so, then the petition should be granted." Id. at 891. Moreover, "in certain cases it may be appropriate to consider the decisions of inferior federal courts as helpful amplifications of Supreme Court precedent." Id. at 890. However, once again, a federal court's mere disagreement with the state court's decision does not constitute evidence of an unreasonable application of Supreme Court precedent by a state court. Werts, 228 F.3d at 197. For example, if the state court identifies the correct legal principle, "but unreasonably applies that principle to the facts of the prisoner's case," then habeas corpus relief is appropriate. Williams, 529 U.S. at 413.

Section 2254(d)(2) is not in issue in federal habeas petitions because the AEDPA requires a federal court to presume that a state court's determination of facts is correct. 28 U.S.C. § 2254(e)(1). This presumption of correctness applies to both explicit and implicit findings of fact. Campbell v. Vaughn, 209 F.3d 280, 286 (3d Cir. 2000). The petitioner bears the burden of rebutting the presumption of correctness by clear and convincing evidence. Id.

IV. DISCUSSION

Petitioner asserts five grounds for relief in his habeas petition. First, petitioner claims that his trial counsel rendered ineffective assistance by failing to develop and implement a sound and legally permissible mitigation strategy for presentation at sentencing. Second, petitioner alleges that his trial counsel rendered ineffective assistance by failing to seek a severance of the penalty phase. Third, petitioner argues that his trial counsel rendered ineffective assistance by failing to properly investigate Gibbons. Fourth, petitioner contends that his trial counsel rendered ineffective assistance by failing to object to the prosecutor's comments that petitioner did not demonstrate remorse during his allocution. Finally, petitioner charges that the Delaware Death Penalty Statute under which he was convicted and sentenced to death violates both the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment pursuant to the United States Supreme Court decision in Ring.[13]

A. Exhaustion of Petitioner's Ineffective Assistance of Counsel Claims

As a threshold matter before reviewing petitioner's four

[13]As stated above, petitioner was sentenced under the version of the Delaware Death Penalty Statute enacted on November 1, 1991. This version differs from the version enacted in 2002 previously mentioned in this opinion. For sake of clarity, when the court refers to the Delaware Death Penalty Statute hereforth, it means the version in effect when petitioner was sentenced to death, unless otherwise noted.

claims concerning ineffective assistance of trial counsel, the court must ascertain whether petitioner has exhausted all available state remedies. With the exception of petitioner's fourth claim concerning trial counsel's failure to object to the prosecutor's comments, petitioner has raised each of the grounds he presents in the application for writ of habeas corpus at bar before the state courts, either in his automatic appeal or in his post-conviction relief proceedings. His state remedies with respect to these claims, therefore, are exhausted and are properly before this court.

1. Petitioner's Claim That Trial Counsel Erred by Failing to Object to the Prosecutor's Comments Regarding Petitioner's Level of Remorse

Petitioner argues that the exhaustion requirement is satisfied for his fourth claim because his co-defendant Steven Shelton presented an argument to the Delaware Supreme Court in his post-conviction appeal based upon an identical factual predicate. See Outten II,, 1997 WL 855718 at *45-*46. In rebuttal, respondent contends that Steven Shelton's claim was not based upon identical factual predicate because the substance of his allocution was distinct from the substance of petitioner's allocution. Respondent also argues that petitioner's claim is barred from being considered by the court under a procedural default standard because petitioner cannot establish: (1) cause for failing to have raised it in state court and actual

prejudice; or (2) a miscarriage of justice.[14]

The court agrees with petitioner that exhaustion applies to his claim based upon Steven Shelton's post-conviction appeal. Contrary to respondent's argument that identical factual predicates do not exist between petitioner's allocution and Steven Shelton's allocution, the court finds that both defendants addressed similar concerns. Witnesses appeared on behalf of both defendants and testified to their abusive family situations, particularly at the hands of their fathers. The jury also heard testimony about petitioner's and Steven Shelton's kind treatment toward their fathers and family in later life. Additionally, in addressing the jury, both defendants acknowledged their past crimes, yet professed that they have positive qualities. Neither specifically asked the court to spare his life; Steven merely asked the jury to exercise fairness. Moreover, the court notes the prosecutor addressed both petitioner and Steven Shelton in his allegedly objectionable comments. In pertinent part, he stated to the jury:

> Another thing that judges, for me, the importance of what you do and what this all means is the remorse that has been shown in this case in the words of [petitioner] Jack Outten in allocution and also Steven

[14]Respondent notes that petitioner cannot raise this claim in state court because Rule 61(i)(1) prevents a motion for state post-conviction relief to be filed more than three years after the judgment of conviction is final. Respondent, therefore, acknowledges that petitioner would be excused from the exhaustion requirement and is in procedural default because no state remedy is available.

> Shelton in allocution. And they told you or paid lip service that they had concerns for the families of the victim, what did you hear about their remorse for their acts? What did you hear about that concern for the families of the victim whose life was taken innocently, without any wrong that he caused any of these individuals?

Outten II, 1997 WL 855718 at *45.

Furthermore, the court is persuaded by the reasoning found in Fatir v. Thomas, 106 F. Supp. 2d 572 (D. Del. 2000). In this decision, the court was confronted with the very issue presently at bar, namely, whether a petitioner's challenge can be exhausted by a co-defendant's presentation of the issue in state court. Id. at 580. The court ruled in favor of the petitioner and offered three reasons for its decision: (1) one of the co-defendants raised the precise challenge included in the petitioner's motion for writ of habeas corpus in a consolidated appeal before the state court; (2) the State squarely addressed the challenge in its briefing; and (3) the Delaware Supreme Court expressly held the object of the challenge was relevant "**as to all defendants**." Id. (emphasis added) The court finds that these reasons apply to the instant facts. Steven Shelton, analogous to the co-defendant in Fatir, raised the issue of the prosecutor's comments in the consolidated post-conviction relief proceeding. The State of Delaware, similar to the State in Fatir, addressed Steven Shelton's motion in its briefing to the court. The Superior Court, like the court in Fatir, based its

decision on generalities applicable to both co-defendants. In this regard, the Superior Court found that the prosecutor's comments were likely triggered by statements made by the co-defendants in their allocutions. The Superior Court specifically observed in a consolidated opinion:

> While Steven may have believed he did not open the door to the prosecutor's remarks, what he said did permissibly allow the prosecutor to remark as he did. When Steven spoke about disrespect to Mannon's family in pleading for his life, he was saying that it would be wrong, at that point, to express remorse.

Outten II, 1997 WL 855718 at *46. The court finds that the Superior Court could have made a similar observation concerning the comments made by petitioner in his allocution. Therefore, the court concludes that petitioner's ineffective assistance of counsel challenge premised on trial counsel's failure to object to the prosecutor's comments is exhausted for purposes of § 2254. Accordingly, the court will consider this challenge in the instant opinion.

B. Ineffective Assistance of Counsel

In order to prevail on a Sixth Amendment claim of ineffective assistance of counsel, a petitioner must allege and establish facts satisfying the two-part test set forth by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). First, the petitioner must show that counsel's advice was unreasonable, Strickland, 466 U.S. at 690, and not "within the range of competence demanded of attorneys in criminal

cases." Hill v. Lockhart, 474 U.S. 52, 56-57 (1985) (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)). In other words, the petitioner must demonstrate that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. A court must be highly deferential to counsel's reasonable strategic decisions when analyzing an attorney's performance. Id. at 689. For example, the United States Supreme Court noted in Strickland that:

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Id. at 688-89 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)).

Second, the petitioner must demonstrate that he was actually prejudiced by counsel's errors. Strickland, 466 U.S. at 694. In this regard, the petitioner need not demonstrate that the outcome of the proceeding would have been different, only that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine

confidence in the outcome." Id. "The court is not engaging in a prophylactic exercise to guarantee each defendant a perfect trial with optimally proficient counsel, but rather to guarantee each defendant a fair trial, with constitutionally competent counsel. In order to assess an ineffectiveness claim properly, the court 'must consider the totality of the evidence before the judge or jury.'" Marshall v. Hendricks, 307 F.3d 36, 85 (3d Cir. 2002)(quoting Strickland, 466 U.S. at 695).

With these principles in mind, the court turns to the merits of petitioner's four ineffective assistance of trial counsel claims.[15] Although the issue of ineffective assistance of counsel is considered to be a mixed question of law and fact subject to de novo review, a presumption of correctness prevails with respect to a state court's determinations concerning historical facts. Id., 466 U.S. at 698. Therefore, the court notes that its latitude is conscripted. That is, petitioner

> must do more than show that he would have satisfied Strickland's test if his claim were being analyzed in the first instance, because under § 2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied Strickland incorrectly . . . Rather, he must show that the [state court] applied Strickland to the facts of his case in an objectively unreasonable manner or that the state court's adjudication was contrary to our clearly established federal law.

Bell v. Cone, 535 U.S. 685,698-99 (2002).

---

[15]Petitioner was presented by attorneys Anthony A. Figliola, Jr. and Sheryl Rush-Milstead during both the guilt and penalty phases.

1. Preparation of Mitigation Strategy

Petitioner alleges that trial counsel failed to exercise minimum competency in preparing for and in presenting evidence at the penalty phase. Specifically, petitioner argues that his trial counsel wrote a letter to him asking for the names of potential penalty phase witnesses, but then did not further investigate these witnesses. Petitioner also argues that his trial counsel did not attempt to present evidence of his neurological damage, low IQ, diagnosed learning disabilities, placement in foster homes, substance abuse, poverty, childhood neglect, or child abuse to the jury.[16] Petitioner claims that his trial counsel, instead, merely attempted to convince the jury that petitioner's life should be spared because he was loving and generous and showed no signs of violent behavior. Petitioner asserts that this strategy was nothing more than a "legally impermissible" attempt to re-argue his innocence to the jury. Petitioner contends that if the jury had been aware of the considerable mitigation evidence, it likely would have recommended life imprisonment rather than a death sentence. For these reasons, petitioner charges that the state court did not reasonably apply Strickland in deciding his appeals.

[16]Petitioner specifically advances a report by Lori James-Monroe, a social worker, dated June 27, 2000 detailing his disturbed juvenile history. (See D.I. 57 at A-123-A-136) Ms. Monroe concluded that petitioner's childhood experiences contributed to his conduct on the night of the murder.

The court cannot grant a petition for habeas corpus on a claim that has been adjudicated on the merits by the state court unless the adjudication resulted in a decision contrary to, or involved an unreasonable application of, clearly established federal law. The court does not find either possibility implicated in the case at bar. The Delaware Superior Court applied the Strickland test to petitioner's mitigation strategy claim and determined that petitioner had failed to demonstrate that his trial counsel's performance was either objectively unreasonable or prejudicial. See Outten II, 1997 WL 855718 at *81-*90. The Delaware Supreme Court affirmed this decision after a separate analysis under Strickland. See Outten III, 720 A.2d at 552-553. Having independently reviewed the evidence, the court agrees with the Superior Court's findings of fact and legal analysis. The court also concludes that the resolution of this claim by the Delaware Superior Court, as affirmed by the Delaware Supreme Court, was based on a reasonable determination of the facts and reflected a reasonable application of Strickland.

With respect to trial counsel's duty to investigate, the United States Supreme Court has commented in Strickland that special standards do not apply in evaluating trial counsel's performance. To this end, the Supreme Court has observed that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than

complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 466 U.S. at 690-91. In line with the Supreme Court's observation, the Third Circuit has held that "the reasonableness of counsel's actions may be affected by the defendant's actions and choices, and counsel's failure to pursue certain investigations cannot be later challenged as unreasonable when the defendant has given counsel reason to believe that a line of investigation should not be pursued." United States v. Gray, 878 F.2d 702, 710 (3d Cir. 1989).

On a broad level, the court notes that petitioner challenges his trial counsel's overall defense strategy of portraying him as loving, caring, and non-violent. The court believes it must address this challenge before delving into the more narrow issue of whether trial counsel rendered ineffective assistance by failing to properly present mitigation evidence. Petitioner agreed to focus his defense on the "positives" as it aligned with his self-proclaimed non-involvement in the murder. On this basis, the court concludes that petitioner cannot now challenge the reasonableness of this strategy. Indeed, the Supreme Court has cautioned that "[i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence." Strickland, 466 U.S. at 689. As noted by respondent, trial counsel reported that they explored the possibility of presenting evidence of medical infirmities pursuant to a

psychiatric evaluation, but decided after consultation with petitioner and his mother that a consistent defense of non-involvement throughout the guilt and penalty phases best served petitioner's interests. (See D.I. 57 at A-87) Trial counsel was concerned that the jury may believe that petitioner was prone to violence if petitioner introduced evidence of behavior problems at the penalty phase. (See D.I. 57 at A-84) By not offering such evidence, trial counsel hoped that the jury would have reservations about petitioner's involvement in the murder and believe that the Sheltons, both of whom had prior histories of violent behavior and had been convicted of robbery and rape, were more responsible for Mannon's death. Thus, the court finds trial counsel's strategy choice to be within the range of professionally reasonable judgment.

Turning to consider the presentation of mitigation evidence from trial counsel's view point at the time of the conduct in question, the court concludes that trial counsel engaged in a reasonable investigation of potential penalty phase witnesses and the pertinent facts underlying petitioner's juvenile history in light of petitioner's elected defense strategy. To this end, trial counsel stated in an affidavit that they consulted with petitioner as to which witnesses to present at the penalty phase. (See D.I. 57 at A-81) Trial counsel also stated that they could not locate any additional list of witnesses that petitioner allegedly identified. (See id.) Trial counsel further stated

that they consulted with petitioner and his mother about petitioner's juvenile history and that they determined nothing in this record would be helpful to effect a "positive" theme. (See id. at A-83) Given these discussions with petitioner, trial counsel had no reason to believe that additional witnesses should be called at the penalty phase to attest to petitioner's difficult life or that a further investigation of petitioner's juvenile history was necessary. In other words, the court finds that trial counsel strategically chose not to pursue investigations that were not relevant to petitioner's "positive" defense. Accordingly, the court concludes that trial counsel's defense, though ultimately unsuccessful, did not fall below an objective standard of reasonableness under Strickland.

Even assuming, arguendo, that trial counsel's performance was deficient, petitioner has failed to demonstrate that he was prejudiced by it. Petitioner did not provide trial counsel with a list of additional witness to testify on his behalf at the penalty phase. In addition, the court is not persuaded that there is a reasonable probability that the jury, if presented with either additional witnesses at the penalty phase or with petitioner's juvenile history, would have concluded that the balance of aggravating and mitigating circumstances did not warrant a death sentence. Although the jury did not learn the details of petitioner's neurological damage, low IQ, diagnosed learning disabilities, or life in foster care, the jury was

alerted to some of the difficulties in petitioner's upbringing through the testimony of his mother, siblings, and girlfriend. These witnesses specifically revealed petitioner's abusive relationship with his father. Petitioner himself likewise discussed his relationship with his father and his history of substance abuse during his allocution. On the basis of this testimony, the court finds that the jury learned of much of the mitigating evidence that petitioner claims erroneously was not introduced due to trial counsel's ineffectiveness. Moreover, the court finds that petitioner merely asserts in a conclusory fashion that the jury would have recommended life imprisonment rather than a death sentence without pointing to any specific evidence to substantiate this assertion. That is, petitioner has failed to show with a reasonable probability that the jury verdict of 7-5 in favor of death would have been decidedly different if a particular witness testified or if a particular fact about his history was made known at the penalty phase. Indeed, admission of the evidence that petitioner seeks to now offer may actually have harmed his case and accentuated his propensity for violence. The court, consequently, concludes that petitioner's claim of ineffective assistance of counsel on grounds of failure to present a competent mitigation strategy fails on the merits.

2. Severance of Penalty Hearing

Petitioner alleges that trial counsel rendered ineffective assistance by failing to seek a severance for the penalty phase of the trial. Petitioner claims that this failure undermined his defense strategy of distinguishing him from his violent co-defendants. Petitioner contends that the jury "lumped" all defendants together and that, but for trial counsel's failure, he would not have been cast in the same light as his violent co-defendants. Consequently, petitioner argues that the adjudication of this claim by the state courts involved an unreasonable application of Strickland.

As previously discussed, the court cannot grant a petition for habeas corpus on a claim that has been adjudicated on the merits by the state court unless the adjudication resulted in a decision contrary to, or involved an unreasonable application of, clearly established federal law. The court again does not find either possibility implicated in the instant case. The Delaware Superior Court applied the Strickland test and decided that petitioner had failed to establish either of the two prongs. See Outten II, 1997 WL 855718 at *79. The Delaware Supreme Court also utilized the Strickland test and affirmed the Superior Court's decision. See Outten III, 720 A.2d at 555-557. Pursuant to a de novo review of the evidence, the court concludes that the Delaware Superior Court's decision, as affirmed by the Delaware

Supreme Court, was correct.

Petitioner has not demonstrated that his trial counsel's decision to not move for a severance of the penalty phase was objectively unreasonable. Rather, trial counsel's decision was consistent with the overall defense strategy of presenting petitioner in a positive light to the jury. To this end, trial counsel stated in an affidavit that a motion for severance was not considered because they wanted the jury to hear about the Sheltons and their history of violence as "robbers and rapists." (See D.I. 57 at A-84) They believed that any comparison between petitioner and the Sheltons would readily place petitioner in a much better light before the jury.

Nevertheless, taking trial counsel's failure to move for a severance as "error," the court notes that trial counsel's strategy was somewhat persuasive. During summation at the penalty phase, the prosecutor distinguished petitioner from the Sheltons. The prosecutor acknowledged that petitioner, unlike the Sheltons, had not committed a violent felony (e.g., rape) prior to the murder. The prosecutor also recognized that petitioner did not act in the same way as the Sheltons. The prosecutor admitted:

> And when I said there's a thread here, the thread is that when Nelson Shelton, Steve Shelton and [petitioner] Jack Outten want something, they don't care about the rules of society, they don't care about the laws, they take it, whether it's sex, whether it's money. And I'm not going to say with [petitioner] it's

> sex, because he does not have any sex convictions that you have - any sex convictions. But about Steven and Nelson, both of them, if they want sex or money, they take it. They don't worry about the laws. They just take it.

(D.I. 106 at A-83) Additionally, upon rendering a sentence, the jury cast five votes in favor of life for petitioner as opposed to only four votes for the Sheltons. On the basis of this evidence, the court concludes that petitioner has failed to show that the sentence reached would likely have been different absent the "error." Accordingly, the court concludes that petitioner's claim of ineffective assistance of counsel on grounds of failure to motion for a severance of the penalty phase is meritless.

3. Investigation of Gibbons

Petitioner alleges that trial counsel failed to properly and timely investigate Gibbons to learn information for purposes of attacking her testimony during the guilt phase.[17] Specifically, petitioner contends that his trial counsel did not initiate an investigation of Gibbons until November 1992, despite his request to investigate statements made by Gibbons while in the psychiatric ward of Gander Hill prison in July 1992. (See D.I.

[17]Gibbons was the State's only eye witness who directly linked petitioner to the murder. She consistently implicated petitioner in the beating that led to Mannon's death, despite offering varying accounts of the events on the night of January 11, 1992 and offering three versions concerning the Sheltons' participation in the murder. (See *infra*, Section II, B) Thus, petitioner asserts that both Gibbons's testimony on cross-examination and her impeachment were critical to his adequate defense.

106 at A-141) Petitioner claims that his trial counsel delayed in this investigation because they embraced a trial strategy that Gibbons committed the murder after Mannon made a sexual advance toward her.[18] (See D.I. 106 at A-152; A-168) Petitioner maintains that a proper investigation could have uncovered Gibbons's troubling psychiatric and mental problems prior to trial[19] and that this information could have been used at trial to discredit her testimony. Therefore, petitioner argues that the state court's adjudication of these claims was contrary to, or involved an unreasonable application of, Strickland.

Because the state court adjudicated this claim on the merits, the court can only grant relief if the state court decision was contrary to, or involved an unreasonable application of, clearly established federal law. The court does not find either ground for habeas relief implicated in the case at bar. In accordance with the Strickland test, the Delaware Superior Court found that petitioner had failed to establish either that his trial counsel's performance was deficient or that he was prejudiced by trial counsel's conduct. See Outten II, 1997 WL

---

[18]According to trial counsel, the defense strategy was to argue that petitioner was not involved in the murder or robbery of Mannon because he had money and, therefore, lacked motive to participate in the crime. (See D.I. 57 at A-85)

[19]Based upon medical reports, Gibbons suffers from both psychiatric and mental problems including a seizure disorder, auditory hallucinations, an Axis II learning disorder, chronic substance and alcohol abuse, and an organic brain disorder. (See D.I. 57 at A-117-A-119; A-175-A-236)

855718 at *80-*81. The Delaware Supreme Court affirmed this decision after independently analyzing the facts under Strickland. See Outten III, 720 A.2d at 557-558. The court agrees with these respective determinations and, thus, rejects petitioner's claim.

The court finds that petitioner has not presented clear and convincing evidence that his trial counsel acted unreasonably in its investigation of Gibbons. Trial counsel made the tactical decision well in advance of trial to pursue a defense strategy that vitiated petitioner's motive to commit murder (i.e., petitioner had money and did not need to kill to acquire it). Trial counsel, instead, consciously opted to accentuate Gibbons's motive to commit murder (i.e., Gibbons needed money and Mannon made sexual advances triggering Gibbons's propensity for violence). In line with this strategy, trial counsel elected not to spend time investigating Gibbons's psychological deficiencies, believing that such evidence could call into question statements that Gibbons made about the murder.

Moreover, the Third Circuit has stated that ineffectiveness is generally clear when trial counsel has completely failed to investigate because trial counsel cannot be said to have made a strategic choice against pursuing a certain line of inquiry without facts upon which to base such a decision. Gray, 878 F.2d at 711 (see also Sullivan v. Fairman, 819 F.2d 1382, 1389 (7th Cir. 1987)(stating that complete failure to investigate

potentially corroborating witnesses can hardly be considered tactical decision)). The facts at bar do not show a complete failure to investigate, albeit one conducted only weeks before the mid-January 1993 trial start date. In November 1992, trial counsel sent an investigator to perform a "comprehensive investigation" of Gibbons and to interview: (1) Micheal Gibbons, Gibbons's estranged husband, to corroborate whether Gibbons hit him with a frying pan in the head; (2) Lisa Bedwell, to ascertain Gibbons's statement about "hitting someone over the head and stealing their money;" and (3) two patrons of the Green Door bar to learn what they witnessed at the bar on the night of the murder. (See D.I. 106 at Supp A-187) This investigation continued into the trial when the investigator interviewed: (1) Julie Paulino, a friend of Gibbons, about Gibbons's involvement in the murder; and (2) DeLude, about Gibbons's alleged statement that "she hit the guy in the head with a hammer." (See D.I. 106 at Supp A-190; A-194) Given this evidence, the court cannot conclude that petitioner's trial counsel was deficient in representing petitioner at the guilty phase.

Assuming, for the sake of argument only, that petitioner's trial counsel did not conduct an adequate investigation into Gibbons's background, the court finds that petitioner cannot show that he was prejudiced by such inadequacy. Petitioner advances evidence concerning Gibbons's mental and psychological impairments that did not exist at the time of trial in January

1993. Based upon her medical records, Gibbons appears not to have been diagnosed with severe polysubstance abuse problems or significant mental disorders until after petitioner's trial. The earliest document offered by petitioner concerning Gibbons's diagnosed psychological condition and unreliability is dated 1995, two years after petitioner's trial. The only relevant medical evidence suggesting Gibbons's troubling psychological problems in existence at the time of trial was her brief admission into the Delaware State Hospital.[20] However, as respondent notes and the court finds significant, this evidence was raised by counsel for Nelson Shelton and excluded by the trial court. The court, therefore, believes that petitioner fails on the prejudice prong of Strickland.

4. Petitioner's Lack of Remorse

Petitioner asserts that the prosecutor, despite knowing that the court instructed the co-defendants not to discuss their guilt

[20]The court notes that Gibbons's medical records show an evaluation performed by the Bureau of Personal Health Services, Delaware Division of Public Health, dated June 7, 1985 which stated that Gibbons had been confined in the Governor Bacon Health Center for a variety of serious problems. (See D.I. 57 at A-183) This report also stated that Gibbons "is a very confused teen, who appears to be developing some significant emotional problems." (Id.) The court finds this information incomplete and vague at best. No other detailed information, such as a report from Governor Bacon Health Center about the precise nature of Gibbons's "serious problems," was of record. Therefore, the court cannot verify that Gibbons suffered mental and psychological problems during her teenage years prior to the murder. Accordingly, the court is not convinced that a further investigation into Gibbons's background would have revealed any additional evidence of her emotional state.

at the penalty phase, purposefully insinuated that he and Steven Shelton had a moral or legal responsibility to express remorse in their respective allocutions to inflame the jury's passions and prejudices. (See D.I. 106 at Supp A-58-A-59) Petitioner contends that his trial counsel should have been familiar with Lesko v. Lehman, 925 F.2d 1527 (3d Cir. 1991), recognized its immediate applicability upon hearing the prosecutor's remarks, and known that his insinuation constituted an impermissible comment on petitioner's Fifth Amendment privilege against self-incrimination. Petitioner, consequently, claims his trial counsel rendered ineffective assistance in failing to object to the remarks.

The Delaware Superior Court applied the Strickland test to Steven Shelton's ineffective assistance claim based upon trial counsel's failure to object to the prosecutor's remarks and determined that Steven Shelton had failed to demonstrate that his trial counsel's performance was either objectively unreasonable or prejudicial.[21] See Outten II, 1997 WL 855718 at *45-*46. The Delaware Supreme Court affirmed the Superior Court's decision concerning petitioner's claim on appeal. Shelton v. State, 744 A.2d 465, 503 (Del. 1999). The court concurs with the Superior

[21]Recall that the court found that petitioner's claim based upon the prosecutor's remarks is exhausted even though petitioner did not specifically raise it before the state courts because his co-defendant Steven Shelton sought post-conviction relief on this ground in state court. See *infra*, Section IV, A, 1.

Court's ruling, as affirmed by the Delaware Supreme Court, after reviewing the evidence of record. The court finds that the resolution of Steven Shelton's claim by the Delaware Superior Court did not result in a decision contrary to, or involving an unreasonable application of, clearly established federal law.

At the outset, the court is mindful that it is not being asked to address whether the prosecutor's comments violated petitioner's Fifth Amendment privilege against self-incrimination. Rather, the court shall consider only whether trial counsel's conduct in failing to object to the prosecutor's comments satisfies the two-prong Strickland test for ineffective assistance of counsel. As evident from the parties' arguments, these issues are quite interrelated, and the court takes great care to avoid blending them any further.

Against this backdrop, the court concludes that petitioner's trial counsel did not violate the first prong of the Strickland test in not objecting to the prosecutor's remarks. Tactical decisions about whether to lodge objections fall squarely within the purview of trial strategy. Indeed, as discussed earlier, a court must afford a strong presumption that trial counsel's conduct falls within the range of reasonable professional conduct. See Strickland, 466 U.S. at 688-89. Petitioner's trial counsel, as respondent suggests, reasonably may have opted not to object so as to avoid calling attention to petitioner's apparent

lack of remorse. Moreover, viewing trial counsel's decision from their perspective at the time of the penalty hearing, the court reasons that not objecting aligned with the defense strategy of maintaining that petitioner was not involved in the murder. Objecting, in contrast, may have suggested to the jury that the defense vacillated irresolutely between positions. For these reasons, the court concludes that petitioner cannot show with clear and convincing evidence that his trial counsel's strategy of withholding an objection was unreasonable.

Even if such strategy were to be considered unreasonable, the court finds that petitioner's claim fails the prejudice prong of Strickland. The Supreme Court has held that the Fifth Amendment self-incrimination clause bars a prosecutor from commenting to the jury about a defendant's failure to testify at trial. Griffin v. California, 380 U.S. 609, 615 (1965). The Third Circuit has held, in turn, that the Griffin rule is applicable not only in the guilt phase, but also in the penalty phase of a death penalty trial. Lesko, 925 F.2d at 1541. To this end, the Third Circuit has observed that "the Griffin rule forbids prosecutorial comment about the defendant's failure to testify concerning the merits of the charges against him." Id. at 1542. However, the Third Circuit has recognized that a defendant who offers testimony of a biographical nature at the penalty phase does not retain a Fifth Amendment privilege against cross-examination or prosecutorial comment on matters reasonably

related to his credibility or the subject matter of his testimony. Id. (citing Harrison v. United States, 392 U.S. 219, 222 (1968)). The Third Circuit also has opined that "[o]ur well-established test for determining whether a prosecutor's remark violates Griffin is 'whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.'" Id. at 1544 (citing Bontempo v. Fenton, 692 F.2d 954, 959 (3d Cir. 1982)(internal citations omitted)). A court should examine the challenged prosecutorial remark in its trial context when making this determination.

Applying this test to the case at bar, the court disagrees with petitioner that Lesko is on "all fours" with the instant case. The court recognizes that some facts at bar are similar to those in Lesko. Neither Lesko nor petitioner testified during the guilt phase of trial, and both defendants maintained throughout the guilt and penalty phases that they were not involved in the murder. Beyond these two similarities, the court finds that the remaining pertinent facts differ. Lesko testified before the jury about his childhood and family background. Petitioner, in contrast, allocuted before the jury.[22]

[22]Petitioner attempts to equate an allocution with testimony offered by a defendant during the penalty phase. Petitioner contends that any distinction between the two is "hypertechnical and meaningless." (D.I. 105 at 43) The court disagrees with petitioner's characterization. Unlike testimony, allocution is not subject to cross-examination. Rather, it is an "unsworn

Additionally, the instant prosecutor's comments made in summation following petitioner's allocution may be viewed as distinctly different from the prosecutor's comments in Lesko made after Lesko testified before the jury. The prosecutor in Lesko stated:

> John Lesko took the witness stand, and you've got to consider his arrogance. He told you how rough it was, how he lived in hell, and he didn't even have the common decency to say I'm sorry for what I did. I don't want you to put me to death, but I'm not even going to say that I'm sorry.

Lesko, 925 F.2d at 1540. In contrast, the prosecutor at bar stated after petitioner's allocution:

> And they told you or paid lip service that they had concerns for the families of the victim, what did you hear about their remorse for their acts? What did you hear about the concern for the families of the victim

---

statement in mitigation to the jury at the close the presentation of evidence in the penalty phase." State v. Zola, 548 A.2d 1022, 1046 (N.J. 1988). The Supreme Court has recognized that allocution is distinct from testimony. Writing for the majority, Justice Frankfurter observed that

> [w]e are not unmindful of the relevant major changes that have evolved in criminal procedure since the seventeenth century - the sharp decrease in the number of crimes which were punishable by death, the right of the defendant to testify on his own behalf, and right to counsel. But we see no reason why a procedural rule should be limited to the circumstances under which it arose if reasons for the right it protects remain. None of these modern innovations lessens the need for the defendant, personally, to have the opportunity to present to the court his plea in mitigation. The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself.

Shelton, 744 A.2d at 492 (Del. 1990)(quoting Green v. United States, 365 U.S. 301, 304 (1965)). Additionally, allocution is a common law right in Delaware pursuant to Delaware Superior Court Criminal Rule 32(a)(1)(c) and the Delaware Death Penalty Statute. See id. at 491.

> whose life was taken innocently, without any wrong that he caused any of these individuals?

Outten II, 1997 WL 855718 at *45. Since the prosecutor in Lesko made his comments following Lesko's direct testimony to the jury, his remarks squarely violate the Griffin test. In other words, as held by the Third Circuit, the natural and necessary interpretation of the prosecutorial remarks in Lesko was that Lesko had a moral or legal obligation during the penalty phase to address the charges against him and to apologize for his crimes. The court does not believe the prosecutorial comments at bar had the same effect on the instant jury. The prosecutor's comments were directed to the content of petitioner's allocution, not to his refusal to testify to the underlying murder. In his allocution, petitioner described his childhood, criminal record, poly-substance abuse, and relationship with his girlfriend and child. Petitioner also attempted to portray himself as loving and caring.[23] The natural inference to be drawn from the prosecutor's overall comments, apart from the single use of the

[23]Petitioner made the following explicit statements about his character in his allocution: "I am hoping to persuade the people involved that I am not a monster. I have feelings.. . . I want to let the [c]ourt know that I wasn't uncontrollable, even though my rap sheet indicates otherwise. . . . To society and the judicial system, I look like a villain, but this is not me.. . . I am full of caring, sharing, honesty, and love. What I am not is a cold, calculated[,] ruthless and heartless person. My good qualities - [m]y good qualities outweigh the negative ones favorably. . . . Give me the benefit of the doubt, because this could mean the end of the road for me. I have faith that you jurors are capable of distinguishing right from wrong." (See D.I. 57 at A-31-A-45)

word "remorse," was that petitioner was not loving or caring, otherwise he would have addressed the grief that Mannon's family undoubtedly suffered as a result of his murder. The prosecutor's comments do not contain any insinuation that petitioner should have emphasized his innocence during his allocution and that, since he did not, the jury should sentence him to death. The prosecutor's comments simply focused on matters reasonably related to petitioner's credibility and addressed a void in his allocution. Indeed, "[a] principal purpose of allocution is to afford the accused an opportunity to ask for mercy and to impress a jury with his or her feelings of remorse." Shelton, 744 A.2d at 496 (citing Homick v. State, 825 P.2d 600, 604 (Nev. 1992)). Consequently, the court finds that petitioner's claim of ineffective assistance of counsel premised on trial counsel's failure to object to the prosecutor's remarks fails on the merits.

C. The Delaware Death Penalty Statute

Petitioner complains that the Delaware Death Penalty Statute violates the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment in light of the Ring decision.[24] In Ring, the United States Supreme Court held that the Sixth Amendment

[24]Though decided ten years after petitioner was sentenced to death under the Delaware Death Penalty Statute, petitioner asserts that Ring is retroactively applicable to his case because it satisfies the test for retroactivity announced in Teague v. Lane, 489 U.S. 288 (1989).

right to a jury trial requires that a jury, not a judge, decide beyond a reasonable doubt the existence of any fact that increases the maximum punishment for first-degree murder from life imprisonment to death. Ring, 536 U.S. at 589. Petitioner contends that this holding, when coupled with Caldwell v. Mississippi, 472 U.S. 320 (1985), prohibits a judge from deciding an accused's ultimate sentence as under the Delaware Death Penalty Statute. Therefore, petitioner maintains that a Caldwell violation will result if the court upholds the constitutionality of the Delaware Death Penalty Statute under Ring and denies his motion for habeas relief.

1. Procedural Bar

In his state court proceedings, petitioner did not claim that Delaware's capital sentencing structure violated his Sixth Amendment right to a jury trial or his due process rights under the Fourteenth Amendment. Petitioner, consequently, is procedurally barred under AEDPA from raising these claims in this habeas proceeding. Nevertheless, petitioner may escape the procedural default doctrine by showing either cause for the default and prejudice or establishing a fundamental miscarriage of justice.[25] Petitioner makes neither showing. Despite this,

[25]Justice O'Connor stated in her dissent in Ring: "I fear that the prisoners on death row in Alabama, Delaware, Florida, and Indiana, which the Court identifies as having hybrid sentencing schemes in which the jury renders an advisory verdict but the judge makes the ultimate sentencing determination . . . may also seize on today's decision to challenge their sentences.

the court finds that the Ring decision excuses petitioner's default on the former grounds. The Supreme Court has held that "cause" to excuse a procedural default may exist "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel." Reed v. Ross, 468 U.S. 1, 16 (1984). Petitioner's claim under Ring falls into this category. At the time of petitioner's state court proceedings, the United States Supreme Court had not decided Ring. Petitioner's post-conviction counsel, therefore, could not have challenged his conviction on Ring grounds during any of the state court proceedings. The instant habeas proceeding presents petitioner with the first opportunity to raise this challenge. The court, consequently, concludes that petitioner has the requisite cause to excuse his procedural default.

The court, however, finds that petitioner was not prejudiced by the procedure employed during the penalty phase. At petitioner's sentencing hearing, the judge was charged with the ultimate decision of determining whether the evidence showed beyond a reasonable doubt the existence of at least one aggravating circumstance. The jury merely functioned in a non-binding advisory capacity counter to the role afforded to the jury in Ring. Nevertheless, the aggravating factors implicated in Mannon's murder were of an objective nature such that a judge

---

There are 529 prisoners on death row in these States." Ring, 536 U.S. at 584-85.

necessarily would have reached the same conclusion as a jury regarding the existence of these circumstances. The first factor was that "[t]he victim was [sixty-two] years of age or older." See 11 Del. C. § 4209(e)(1)(r). Mannon was sixty-two years old when petitioner and the Sheltons killed him. The second factor was that "[t]he murder was committed while the defendant was engaged in the commission of, or attempt to commit, or flight after committing or attempting to commit any degree of rape, unlawful sexual intercourse, arson, kidnapping, robbery, sodomy or burglary." See 11 Del. C. § 4209(e)(1)(j). Mannon was killed during the course of a robbery. The last factor was that "[t]he murder was committed for pecuniary gain." See 11 Del. C. § 4209(e)(1)(o). Petitioner and the Sheltons killed Mannon for his money and jewelry. Therefore, the court concludes that petitioner cannot show that the state's failure to sentence him under the type of scheme outlined in Ring worked to his actual and substantive disadvantage. Accordingly, petitioner is procedurally barred from bringing his Sixth Amendment and Due Process claims in this habeas proceeding.

2. Retroactivity[26]

a. The Legal Standard

Alternatively, if petitioner is not procedurally barred from advancing a Ring claim, the court must determine whether the Ring decision should be retroactively applied to this habeas corpus action on collateral review. The initial step in analyzing the retroactivity of a new rule of law is to determine whether the rule is substantive or procedural in nature because "'the Supreme Court has created separate retroactivity standards for new rules of criminal procedure and new decisions of substantive law.'" See United States v. Swinton, 333 F.3d 481, 487 (3d Cir. 2003) (quoting In re Turner, 267 F.3d 225, 229 (3d Cir. 2001) (internal citations omitted)). The distinction between "substantive" and "procedural," however, is not always easy to discern. Indeed, the Third Circuit has observed that cases in the habeas context in particular do "not fit neatly under either the substantive standard for determining retroactivity or the procedural standard." United States v. Woods, 986 F.2d 669, 671 (3d Cir.

[26]The court acknowledges that the United States Supreme Court granted certiorari on December 1, 2003 in Schriro v. Summerlin, 124 S.Ct. 833 (2003), to address the very issues at bar, namely, (1) whether the rule announced in Ring is substantive, rather than procedural, and therefore exempt from Teague's retroactivity analysis, and (2) if the rule is procedural, whether it fits within the "watershed" exception to the general rule of non-retroactivity. Nonetheless, because this case has been stayed multiple times awaiting various appellate decisions, the court has determined that another stay would not serve the interests of justice.

1993). Despite this difficulty, the Supreme Court has recognized that it is an important distinction in the habeas context because the principal function of habeas relief is to assure that no man is incarcerated under a procedure that creates the risk that an innocent man will be convicted. Bousley v. United States, 523 U.S. 614, 620 (1998).

In general, substantive rules determine the meaning of a criminal statute so that conduct that formerly resulted in criminal liability may no longer be illegal. Id. The Supreme Court has observed that "decisions of this Court holding that a substantive federal criminal statute does not reach certain conduct, like decisions placing conduct 'beyond the power of the criminal law-making authority to proscribe,' necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal." Id. at 620-21. Decisions announcing substantive rules, consequently, often address the criminal significance of certain facts or the underlying prohibited conduct. See Curtis v. United States, 294 F.3d 841, 843 (7th Cir. 2002).

In contrast, a procedural rule does not interpret the scope of a statute. Bousley, 523 U.S. at 621. A procedural rule changes the way a case is adjudicated, not what the government must prove to establish a criminal offense. New procedural rules "recognize[] a constitutional right that typically applies to all crimes irrespective of the underlying conduct, and to all

defendants irrespective of their innocence or guilt." Coleman v. United States, 329 F.3d 77, 84 (2d Cir. 2003). New rules of substantive criminal law, therefore, are presumptively retroactive on habeas review, id. at 620, whereas new rules of criminal procedures are presumptively non-retroactive on habeas review. Teague, 489 U.S. at 306, 310.

In Teague, the Supreme Court announced principles regarding retroactivity in the habeas context for new rules of criminal procedure.[27] The Supreme Court explained that because of the interest in finality of judgments in the criminal justice system, a new rule of criminal procedure does not apply retroactively to cases that have become final before the new rule is announced unless the new rule falls within one of two narrow exception categories. Id. at 309-10. The Supreme Court specifically recognized that

> [a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect.. . . The 'costs imposed upon the State[s] by retroactive application of new rules of constitutional law on habeas corpus . . . generally far outweigh the benefits of this application.'

Id. at 309-310 (quoting Solem v. Stumes, 465 U.S. 638, 654

[27]"Although there was no majority opinion in Teague, the Supreme Court has since treated Justice O'Connor's plurality opinion as setting forth the holding of the Court." Coleman, 329 F.3d at 82 n.3 (2d Cir. 2003) (citing Tyler v. Cain, 533 U.S. 656, 665 (2001)).

(1994)).

As a result of the interest in finality, a reviewing court must conduct a three-step analysis after finding a new rule procedural in nature to decide whether Teague bars retroactive application of the rule. First, the reviewing court "must ascertain the date on which the defendant's conviction and sentence became final." Caspari v. Bohlen, 510 U.S. 383, 390 (1994). "Final, in the context of [a] retroactivity analysis, means that a judgment of conviction has been entered, the time for direct appeals from that judgment has expired, and the time to petition the United States Supreme Court for certiorari has expired." Diaz v. Scully, 821 F.2d 153, 156 (2d Cir. 1987). Second, the reviewing court must survey "the legal landscape" as it existed on the date that the defendant's conviction became final and determine if a "court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule . . . [already] was required by the Constitution." Caspari, 510 U.S. at 390. That is, "a case announces a new rule [of criminal procedure] when it breaks new ground or imposes a new obligation on the [s]tates or the [f]ederal [g]overnment. To put it differently, a case announces a new rule [of criminal procedure] if the result was not dictated by precedent existing at the time the defendant's conviction became final." Teague, 489 U.S. at 301 (citations omitted). If existing precedent already required

application of the rule, then the Teague retroactivity bar does not apply. However, if the procedure at issue is considered new for Teague purposes, then the court must proceed to the third step of the analysis and determine whether an exception applies. To this end, a new rule of criminal procedure will apply retroactively if it either (1) "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe;" or (2) "requires the observance of those procedures that are implicit in the concept of ordered liberty." Id. at 311 (internal quotations omitted). The first exception overcomes the presumption against retroactivity only if the new rule "places a class of private conduct beyond the power of the State to proscribe or addresses a 'substantive categorical guarante[e] accorded by the Constitution,' such as a rule 'prohibiting a certain category of punishment for a class of defendants because of their status or offense.'" Saffle v. United States, 494 U.S. 484, 494 (2000)(internal citations and quotations omitted). The second exception is reserved for "watershed rules of criminal procedure." Teague, 481 U.S. at 311. Such rules are those in which (1) a failure to adopt the new rule "creates an impermissibly large risk that the innocent will be convicted," and (2) "the procedure at issue . . . implicates the fundamental fairness of the trial." Id. at 312. Following the Teague decision, the Supreme Court explained in Sawyer v. Smith, 497 U.S. 227, 242 (1990)(citing Teague, 489

U.S. at 311), that

> [i]t is thus not enough under Teague to say that a new rule is aimed at improving the accuracy of trial. More is required. A rule that qualifies under this exception must not only improve accuracy, but also "alter our understanding of the bedrock procedural elements" essential to the fairness of a proceeding.

In light of this explanation, watershed rules overcome the presumption against retroactivity only if they "improve accuracy [of trial]" and "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding.'" Sawyer, 497 U.S. at 242.

Having defined the analytical framework for a retroactivity analysis, the court must consider whether Ring announced a substantive rule or a procedural rule as to Delaware criminal law. The court notes that this question is a matter of first impression in this district. If Ring only stands for the proposition that every element of a crime must be submitted to a jury, then it could be characterized as a pure procedural rule that extends Apprendi v. New Jersey, 530 U.S. 466 (2000), in the context of a capital crime. If, on the other hand, Ring is construed to define the offense of capital murder under Delaware law, then it may be regarded as a substantive decision.

In Apprendi, the defendant fired several bullets into the home of an African American family that had recently moved into a previously all-white New Jersey neighborhood. The defendant pled guilty to possession of a firearm for an unlawful purpose, a

crime that New Jersey's substantive criminal statute designated as a second-degree offense punishable under New Jersey's felony sentencing statute by a five to ten year prison term. The trial judge enhanced the defendant's sentence to twelve years pursuant to the New Jersey hate crime law after finding that the defendant's underlying crimes were motivated by racial bias.[28] Id. at 469-70.

The defendant challenged the constitutionality of New Jersey's hate crime statute, arguing that the Due Process Clause "requires that the finding of bias upon which [the] hate crime sentence was based must be proved to a jury beyond a reasonable doubt." Id. at 471. The United States Supreme Court agreed with the defendant and held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 490. The Supreme Court commented that it is immaterial whether the required fact-finding is labeled an "element" or a "sentencing factor." Rather, the Supreme Court explained that "the relevant inquiry is not one of form, but of effect - does the required finding expose the defendant to a greater punishment than that

[28]Under the New Jersey hate crime law, a trial judge may extend the term of imprisonment if he finds by a preponderance of the evidence that the defendant acted purposefully to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation, or ethnicity.

authorized by the jury's guilty verdict?" Id. at 494. The Supreme Court also expressly declared that its decision did not impact substantive New Jersey criminal law, stating "the substantive basis for New Jersey's enhancement is not at issue; the adequacy of New Jersey's procedure is." Id. at 475.

In Ring, the defendant participated in an armed robbery of a Wells Fargo armored van. The van driver was killed by a single gunshot to the head during the course of the robbery. The jury found the defendant guilty of felony-murder as opposed to premeditated murder. Based solely on this jury verdict, the maximum punishment he could have received under Arizona law was life imprisonment. Nevertheless, the defendant was eligible for the death penalty if he was the victim's actual killer or if he was "a major participant in the armed robbery that led to the killing and exhibited a reckless disregard or indifference for human life." See Enmund v. Florida, 458 U.S. 782 (1982)(holding that the Eighth Amendment permits execution of a felony-murder defendant who killed or attempted to kill); see also Tison v. Arizona, 481 U.S. 137, 158 (1987)(holding that the Eighth Amendment also permits execution of felony-murder defendant, who did not kill or attempt to kill, but who was a "major participant in the felony committed" and who demonstrated "reckless indifference to human life"). Citing accomplice testimony at the sentencing hearing, the judge found both that the defendant was the actual killer and that he was a major participant in the

armed robbery. The judge also found two aggravating factors and one non-statutory mitigating factor. The judge concluded that the mitigating circumstance did not "call for leniency" and, thus, sentenced the defendant to death.[29]

The defendant appealed his sentence, arguing that Arizona's capital sentencing scheme violated the Sixth and Fourteenth Amendments because it required a judge to find the facts particular to raising the maximum penalty for a crime. The Supreme Court concluded that, "[b]ecause Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury." Ring, 536 U.S. at 609 (citing Apprendi, 530 U.S. at 494, n. 19). The Supreme Court observed that "[t]he right to trial by jury would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death."[30] Ring, 536 U.S. at

---

[29]Under Arizona law, first-degree murder is punishable by death or life imprisonment. See Ring, 536 U.S. at 592 (citing Ariz. Rev. Stat. Ann. 13-1105(c) (2001)). The trial judge is to conduct a separate hearing to determine the existence or non-existence of certain enumerated circumstances to determine the sentence to impose. Id. (citing Ariz. Rev. Stat. Ann. 13-703 (2001)). The statute also instructs that "[t]he hearing shall be conducted before the court alone. The court alone shall make all factual determinations required by this section or the constitution of the United States or this state." Id. (quoting Ariz. Rev. Stat. Ann. 13-703 (2001)).

[30]Justice Stevens's dissent in Walton v. Arizona, 497 U.S. 639 (1990), foreshadows this observation. Justice Stevens argued

609. Accordingly, the Supreme Court held that "[c]apital defendants, no less than noncapital defendants, . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." Id. at 589.[31]

b. Ring v. Arizona: A New Rule of Criminal Procedure

After careful review of both Apprendi and Ring, the court agrees with the Tenth and Eleventh Circuits and various state appellate courts that Ring is an extension of Apprendi. See Turner v. Crosby, 339 F.3d 1247, 1284 (11th Cir. 2003); Cannon v. Mullin, 297 F.3d 989, 994 (10th Cir.); Woldt v. People, 64 P.3d 256, 266 (Colo. 2003); Wright v. State, 857 So.2d 861, 877-78 (Fla. 2003); Leone v. State, 797 N.E.2d 743, 750 (Ind. 2003); State v. Whitfield, 107 S.W.3d 253, 257 (Mo. 2003); Colwell v. State, 59 P.3d 463, 469 (Nev. 2002); Colwell v. Nevada, 124 S. Ct. 462 (2003); Murphy v. State, 54 P.3d 556, 566 (Okla. Crim. App. 2002). That is, Apprendi dictates the type of fact-finding

---

that "Arizona's aggravating circumstances . . . operate as statutory 'elements' of capital murder under Arizona law because in their absence, that sentence is unavailable." Id. at 709 & n.1. Justice Stevens further contended that "findings of factual elements necessary to establish a capital offense" must be determined by a jury rather than a judge. Id. at 710-14.

[31]In reaching this holding, the Supreme Court expressly overruled Walton, a decision that upheld Arizona's capital sentencing structure under which a judge, rather than a jury, determined whether the prosecution had established an aggravating factor necessary to subject the defendant to the death penalty.

process that must be employed in a criminal sentencing hearing. Ring applies Apprendi to capital crimes, prescribing what fact-finding process must be in employed in a capital sentencing hearing. Because the Third Circuit and every other federal appellate court that has considered whether Apprendi created a substantive or a procedural rule has found it to be procedural, the court is compelled to follow this precedent and find that Ring likewise is procedural. See Sepulveda v. United States, 330 F.3d 55, 62-63 (1st Cir. 2003); Coleman, 329 F.3d at 83-88 (2d Cir. 2003); United States v. Jenkins, 333 F.3d 151, 154 (3d 2003); Swinton, 333 F.3d at 489 (3d Cir. 2003); United States v. Sanders, 247 F.3d 139, 147-48 (4th Cir. 2001); United States v. Brown, 305 F.3d 304, 307-09 (5th Cir. 2002); Curtis, 294 F.3d at 842-44 (7th Cir. 2002); Cannon, 297 F.3d at 994 (10th Cir. 2002). The court notes that this finding aligns with the decisions of three federal appellate courts that have considered the substantive/procedural question for Ring. See Turner, 339 F.3d at 1284; Cannon, 297 F.3d at 994; In re Johnson, 334 F.3d 403, 405 n.1 (5th Cir. 2003)(dicta); see also Summerlin v. Stewart, 341 F.3d 1082, 1101 (9th Cir. 2003)(holding Ring to announce a procedural rule in part). Accordingly, the court will analyze Ring under Teague to ascertain whether Ring should be retroactively applied on collateral review.

c. Analysis of Ring v. Arizona Under Teague v. Lane

As the first step in a Teague analysis, the court must ascertain the date that petitioner's conviction became final. The United States Supreme Court denied petitioner's application for a writ of certiorari on June 19, 1995. See Outten v. Delaware, 515 U.S. 1145 (1995). The relevant date for this analysis, therefore, is June 19, 1995.

Next, the court must survey "the legal landscape" as it existed on June 19, 1995 to determine whether the result in Ring was dictated by then-existing precedent. Under the capital sentencing scheme for first-degree murder contained within the Delaware Death Penalty Statute in effect throughout 1995, a sentence of death could be imposed only under the bifurcated procedure prescribed by 11 Del. C. § 4209. Hameen v. State, 212 F.3d 226, 231-32 (3d Cir. 2000)(quoting Wright v. State, 633 A.2d 329, 335 (Del. 1993)). "Any person convicted of first-degree murder shall be punished by death or by imprisonment for the remainder of his or her natural life without benefit of probation or parole or any other reduction." 11 Del. C. § 4209(a) (1991). Under § 4209(b), a hearing had to be conducted on the issue of punishment to determine the precise sentence. If the defendant was convicted of first-degree murder by a jury, then the jury was required to recommend answers to the following questions:

(1) [w]hether the evidence show[ed] beyond a reasonable

doubt the existence of at least [one] aggravating circumstance as enumerated in subsection (e) of this section;[32] and

---

[32]Section 4209(e)(1) provided for twenty-two possible aggravators: (a) The murder was committed by a person in, or who has escaped from, the custody of a law-enforcement officer or place of confinement; (b) The murder was committed for the purpose of avoiding or preventing an arrest or for the purpose of effecting an escape from custody; (c) The murder was committed against any law-enforcement officer, corrections employee or firefighter, while such victim was engaged in the performance of official duties; (d) The murder was committed against a judicial officer, a former judicial officer, Attorney General, former Attorney General, Assistant or Deputy Attorney General or former Assistant or Deputy Attorney General, State Detective or former State Detective, Special Investigator or former Special Investigator, during, or because of, the exercise of an official duty; (e) The murder was committed against a person who was held or otherwise detained as a shield or hostage; (f) The murder was committed against a person who was held or detained by the defendant for ransom or reward; (g) The murder was committed against a person who was a witness to a crime and who was killed for the purpose of preventing the witness's appearance or testimony in any grand jury, criminal or civil proceeding involving such crime, or in retaliation for the witness's appearance or testimony in any grand jury, criminal or civil proceeding involving such crime; (h) The defendant paid or was paid by another person or had agreed to pay or be paid by another person or had conspired to pay or be paid by another person for the killing of the victim; (i) The defendant was previously convicted of another murder or manslaughter or of a felony involving the use of, or threat of, force or violence upon another person; (j) The murder was committed while the defendant was engaged in the commission of, or attempt to commit, or flight after committing or attempting to commit any degree of rape, unlawful sexual intercourse, arson, kidnapping, robbery, sodomy or burglary; (k) The defendant's course of conduct resulted in the deaths of [two] or more persons where the deaths are a probable consequence of the defendant's conduct; (l) The murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, use of an explosive device or poison or the defendant used such means on the victim prior to murdering the victim; (m) The defendant caused or directed another to commit murder or committed murder as an agent or employee of another person; (n) The defendant was under a sentence of life imprisonment, whether for natural life or otherwise, at the time of the commission of the murder; (o) The

> (2) [w]hether, by a preponderance of the evidence, after weighing all relevant evidence in aggravation or mitigation which [bore] upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender, the aggravating circumstances found to exist outweigh[ed] the mitigating circumstances found to exist.

11 Del. C. § 4209(c)(3). The trial court, after considering the recommendation of the jury as to both questions, was required to decide the same questions. 11 Del. C. § 4209(d). If the court answered both questions in the affirmative, then it had to impose a sentence of death; otherwise, it had to impose a sentence of life imprisonment without the possibility of probation, parole, or other reduction in sentence. Id. "Thus, the Superior Court [bore] the ultimate responsibility for imposition of the death sentence [under the Delaware Death Penalty Statute] while the

---

murder was committed for pecuniary gain; (p) The victim was pregnant; (q) The victim was severely handicapped or severely disabled; (r) The victim was [sixty-two] years of age or older; (s) The victim was a child [fourteen] years of age or younger, and the murder was committed by an individual who is at least [four] years older than the victim; (t) At the time of the killing, the victim was or had been a non-governmental informant or had otherwise provided any investigative, law enforcement or police agency with information concerning criminal activity, and the killing was in retaliation for the victim's activities as a non-governmental informant or in providing information concerning criminal activity to an investigative, law enforcement or police agency; (u) The murder was premeditated and the result of substantial planning; and (v) The murder was committed for the purpose of interfering with the victim's free exercise or enjoyment of any right, privilege or immunity protected by the First Amendment to the United States Constitution, or because the victim has exercised or enjoyed said rights, or because of the victim's race, religion, color, disability, national origin or ancestry.

jury act[ed] in an advisory capacity 'as the conscience of the community.'" Hameen, 212 F.3d at 232 (quoting State v. Cohen, 604 A.2d 846, 856 (Del. Super. 1992)). Following careful review of the provisions of the Delaware Death Penalty Statute, there is no doubt that Ring positively announced a new rule of criminal procedure not dictated by precedent as it existed in 1995. That is, the Delaware Death Penalty Statute did not require the jury to act as the final decision-maker concerning the existence of aggravating circumstances. The court, therefore, must proceed to the third step in the analysis, namely, whether either one of the two Teague exceptions apply to the facts at bar.

The first category of rules excepted from Teague's retroactivity bar is that which places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." Teague, 489 U.S. at 307. Ring clearly does not avail this exception. See Turner, 339 F.3d at 1285 (holding that Ring does not implicate the first Teague exception). Just as numerous courts have recognized that Apprendi did "not decriminalize any class of conduct or prohibit a certain category of punishment for a class of defendants," Ring likewise did not decriminalize first-degree murder or prohibit the State from punishing first-degree murder. See, e.g., Jones v. Smith, 231 F.3d 1227, 1237 (9th Cir. 2000)(holding that "the first exception identified in Teague is plainly inapplicable here, where the state's authority to punish petitioner for

attempted murder is beyond question"); United States v. Sanders, 247 F.3d 139, 148 (4th Cir. 2001)(holding that "the first exception clearly does not apply here because Apprendi did not place drug conspiracies beyond the scope of the state's authority to proscribe").

The second category of rules excepted from Teague's retroactivity bar is that which "requires the observance of those procedures that are implicit in the concept of ordered liberty." Teague, 489 U.S. at 307. "This exception is a narrow one, and its narrowness is consistent with the recognition underlying Teague that retroactivity 'seriously undermines the principle of finality which is essential to the operation of our criminal justice system.'" Spaziano v. Singletary, 36 F.3d 1028, 1042-43 (11th Cir. 1994)(quoting Teague, 489 U.S. at 309). The Supreme Court has emphasized the narrowness of this second exception by using as a prototype the rule of Gideon v. Wainwright, 372 U.S. 335 (1963),[33] and by noting that "we believe it unlikely that many such components of basic due process have yet to emerge." Teague, 489 U.S. at 313; see also Saffle, 494 U.S. at 495; Butler v. McKellar, 494 U.S. 407, 415 (1990); O'Dell v. Netherland, 521 U.S. 151, 170 (1997). The Court has further underscored the

[33]In Gideon v. Wainwright, 372 U.S. 335 (1963), the Supreme Court held that the right of an indigent defendant in a criminal trial to have the assistance of counsel is a fundamental right essential to a fair trial. This decision dramatically changed American criminal procedure by requiring states to provide counsel in all criminal trials involving serious offenses.

narrowness of the second Teague exception by its actions. Beginning with Teague in 1989, the Court has examined numerous new rules of law against the second exception and found that none of them fit within its narrow confines. See, e.g., Teague, 489 U.S. at 307; Caspari, 510 U.S. at 396; Graham v. Collins, 506 U.S. 461, 478 (1993); Sawyer, 497 U.S. at 242; Saffle, 494 U.S. at 495; Butler, 494 U.S. at 416.

Mindful of the narrow confines of the second Teague exception, the court finds that Ring neither improves accuracy of trial nor alters our understanding of the bedrock procedural elements essential to the fairness of a proceeding. Ring merely shifted the ultimate fact-finding responsibility as to existence of aggravating circumstances in the capital crime context from the judge to the jury. This shift does not enhance the likelihood of an accurate sentencing result. Indeed, the Supreme Court has recognized that judges are unbiased and honest. See Withrow v. Larkin, 421 U.S. 35, 47 (1975). Additionally, the Delaware Death Penalty Statute required a two-phase approach wherein the jury offered a recommendation to the judge as to both the aggravating factors and the sentence. The jury's recommendation likely served as a check for the judge, thereby lending somewhat of a safeguard to the sentencing process. Furthermore, accuracy is not readily measurable with respect to the existence of aggravating circumstances. The Delaware Death Penalty Statute provided for some aggravators that may be

characterized as objective, like those implicated in the facts at bar, and others that very clearly are subjective, such as whether "the murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, use of an explosive device or poison or the defendant used such means on the victim prior to murdering the victim" and whether "the murder was premeditated and the result of substantial planning." See 11 Del. C. § 4209 (e)(1)(l) and (u). While a reviewing court could attempt to measure the accurate determination of the objective aggravators, there would be no way for a reviewing court to measure the accurate determination of the subjective aggravators. The court, therefore, concludes that petitioner cannot meet the first requirement necessary to avail the second Teague exception.

Turning to consider the second requirement, every federal appellate court that has considered Apprendi under Teague's second exception has concluded that it did not represent a watershed rule of criminal procedure. See Sepulveda, 330 F.3d at 59-63 (1st Cir. 2003); Coleman, 329 F.3d at 88-90 (2d Cir. 2003); Swinton, 333 F.3d 481, 489-91 (3d Cir. 2003); Sanders, 247 F.3d at 148-51 (4th Cir.); United States v. Brown, 305 F.3d 304, 309-10 (5th Cir. 2002); Regalado v. United States, 334 F.3d 520, 526-27 (6th Cir. 2003); Curtis, 294 F.3d at 843-44 (7th Cir. 2002); United States v. Moss, 252 F.3d 993, 998-1001 (8th Cir. 2001); United States v. Sanchez-Cervantes, 282 F.3d 664, 669-70 (9th Cir. 2002); United States v. Mora, 293 F.3d 1213, 1218-19 (10th Cir.);

McCoy v. United States, 266 F.3d 1254, 1255-58 & n.16 (11th Cir. 2001). Several state appellate courts have also held that Apprendi did not announce a watershed rule. See People v. Bradbury, 68 P.3d 494, 496-97 (Colo. App. 2002); Figarola v. State, 841 So.2d 576, 577 (Fla. App. 2003); People v. Gholston, 772 N.E.2d 880, 886-88 (Ill. App. 2002); Whisler v. State, 36 P.3d 290, 300 (Kan. 2001); Meemken v. State, 662 N.W.2d 146, 149-50 (Minn. App. 2003); Teague v. Palmateer, 57 P.3d 176, 183-87 (Ore. App. 2002). While the court recognizes that the nature of the crimes underlying the Apprendi and Ring decisions differ, the court, nonetheless, finds that Ring, as an extension of Apprendi, is not a watershed rule. The court notes that select appellate courts have reached the same conclusion. See Turner, 339 F.3d at 1285-86 (11th Cir. 2003); Head v. Hill, 587 S.E.2d 613, 619 (Ga. 2003); State v. Lotter, 664 N.W.2d 892, 905-08 (Neb. 2003); Colwell, 59 P.3d at 473 (Nev. 2002); State v. Towery, 64 P.3d 828 (Ariz. 2003). Unlike the Supreme Court prototype case, Gideon, where the fundamental fairness of an indigent's trial was necessarily impacted by whether he was able to avail the assistance of counsel, Ring does not implicate the same fairness concerns. That is, there is no reason to believe that an impartial jury would reach a more accurate conclusion regarding the presence of aggravating circumstances than an impartial judge. Indeed, the Supreme Court explained in Ring that "the Sixth Amendment jury trial right . . . does not turn on the

relative rationality, fairness, or efficiency of potential factfinders." Ring, 536 U.S. at 607.

Moreover, Supreme Court precedent substantiates the conclusion that Ring does not constitute a watershed rule. The Supreme Court declined to make Duncan v. Louisiana, 391 U.S. 145 (1968), which applied the Sixth Amendment's jury trial guarantee to the states through the Fourteenth Amendment, retroactive. DeStefano v. Woods, 392 U.S. 631, 633 (1968). The Supreme Court held that Duncan "should receive only prospective application." Id. Even though the DeStefano decision preceded Teague, the Supreme Court's reasoning is still relevant. The Supreme Court stated, "We would not assert, however, that every criminal trial - or any particular trial - held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury." Id. at 634-35 (quoting Duncan, 391 U.S. at 158). For these reasons, the court concludes that Ring fails to meet the second requirement of the second Teague exception. Accordingly, the court holds that the new rule of criminal procedure embodied in Ring does not apply retroactively on collateral review.[34]

[34]In her dissent in Ring, Justice O'Connor observed that prisoners "will be barred from taking advantage of [Ring's] holding on federal collateral review." Ring, 536 U.S. at 621 (citing 28 U.S.C. 22449b)(2)(A), 2254(d)(1) and Teague, 489 U.S. 288)).

d. Ring v. Arizona: A New Rule of Substantive Criminal Law In Delaware

In the alternative, the court will consider the potential substantive effect of Ring on Delaware criminal law. The Supreme Court observed in Ring that the Delaware Death Penalty Statute, similar to the death penalty laws in place in Florida, Alabama, and Indiana, created a hybrid system wherein the jury renders an advisory verdict and the judge makes the ultimate sentencing determination. See id. at 608. The Eleventh Circuit has analyzed the substantive impact of Ring on Florida's analogous hybrid system in the Turner decision. See Turner, 339 F.3d at 1279-1286. This court, consequently, carefully considers that decision in addressing Delaware's hybrid system under Ring. The court agrees with the Eleventh Circuit that Ring neither impacts the types of aggravating factors that must be shown under the hybrid scheme to elevate the sentence from life imprisonment to death nor changes the State's burden to establish those factors beyond a reasonable doubt. See id. at 1284. On this basis, the Eleventh Circuit concluded that Ring is not a substantive decision as to Florida criminal law, stating "Ring altered only who decides whether any aggregating circumstances exist and, thus, altered only the fact-finding procedure." Id.

Although the court readily concurs with this conclusion, the court recognizes that the impact of Ring on Delaware criminal law may not be restricted to procedure alone, but may entail

substantive implications as well. A defendant found guilty of first-degree murder under the Delaware Death Penalty Statute was not automatically sentenced to death as noted above. Rather, the jury was required to recommend to the judge whether the aggravating circumstances outweighed the mitigating circumstances by a preponderance of the evidence. The judge, in turn, was required to make this same determination. Thus, in practical effect, Delaware's aggravating circumstances may be viewed as operating as statutory elements of the offense of capital murder, distinguishable from the offense of non-capital murder under Delaware law. From this vantage, the court concludes that Ring modified substantive criminal law in Delaware by establishing two distinct crimes, to wit, capital murder with aggravating circumstances as elements and non-capital murder. The court notes that the Ninth Circuit reached the same conclusion when considering the effect of Ring on Arizona criminal law. See Summerlin, 341 F.3d at 1101-1108. The Ninth Circuit opined that Ring restored the pre-Walton structure of capital murder law in Arizona. Id. at 1105. The Ninth Circuit relied on Sattazahn v. Pennsylvania, 537 U.S. 101 (2003), for support. Writing for the majority in Sattazahn, Justice Scalia stated: "Put simply, if the existence of any fact (other than a prior conviction) increases the maximum punishment that may be imposed on a defendant, that fact - no matter how the State labels it - constitutes an element, and must be found by a jury beyond a reasonable doubt."

Id. (quoting Sattazahn, 537 U.S. at 111). Thus, the Ninth Circuit found that "there is a distinct offense of capital murder, and the aggravating circumstances that must be proven to a jury in order to impose a death sentence are elements of that distinct capital offense." Summerlin, 341 F.3d at 1105(citing Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)).

The court further notes that the substantive effect of Ring on Delaware law is substantiated by the fact that the General Assembly of the State of Delaware amended the Death Penalty Statute in 2002 in response to Ring (the "2002 Statute"). See Brice, 815 A.2d at 320 (citing 73 Del. Laws c. 423 (2002), S.B. 449). "The 2002 Statute transformed the jury's role, at the so-called narrowing phase, from one that was advisory under the 1991 version of Section 4209 into one that is now determinative as to the existence of any statutory aggravating circumstance." Id. This amendment, therefore, prevents a court from imposing a death sentence unless a jury first determines unanimously and beyond a reasonable doubt that at least one statutory aggravating circumstance exists. Id. (citing S.B. 449, Synopsis) Therefore, the court concludes that Ring has a substantive impact on Delaware criminal law.

e. Harmless Error

Before ruling that Ring should be retroactively applied to petitioner's case, the court shall consider whether the instant Ring error meets the standard for harmless error. "[T]he United

States long ago through its Congress established for its courts the rule that judgments shall not be reversed for 'errors or defects which do not affect the substantial rights of the parties.'" Chapman v. California, 386 U.S. 18, 22 (1967). In Chapman, the Supreme Court found that there are "some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring automatic reversal." Id. In so holding, the Supreme Court presented a two-step analysis for an appellate court dealing with a constitutional error to use on direct review. First, the court must determine if the error falls into the category of violations subject to the federal harmless constitutional error rule or if the error instead falls into the category of errors requiring automatic reversal. Second, if the federal harmless constitutional error rule is applicable, then the court must determine the impact of the error under this rule. To this end, the Supreme Court held that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Id. at 23.

In Arizona v. Fulminante, 499 U.S. 279, 310 (1991), the Supreme Court characterized those errors placed in the automatic reversal category as involving "structural defect[s] affecting the framework within which the trial proceeds rather than simply

an error in the trial process itself." Structural defects are "defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." Id. at 309. In contrast, a trial error is an "error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." Id. at 307-08. The Supreme Court has observed that structural errors have been found in a "very limited class of cases." See Johnson v. United States, 520 U.S. 461 (1997) (citing structural errors for (1) Gideon (a total deprivation of the right to counsel); (2) Tumey v. Ohio, 273 U.S. 510 (1927)(lack of an impartial trial judge); (3) Vasquez v. Hillery, 474 U.S. 254 (1986)(unlawful exclusion of grand jurors on the basis of race); (4) McKaskle v. Wiggins, 465 U.S. 168 (1984)(denial of the right to self-representation at trial); (5) Waller v. Georgia, 467 U.S. 39 (1984)(denial of the right to a public trial); and (6) Sullivan v. Louisiana, 508 U.S. 275 (1993) (an erroneous reasonable doubt instruction to the jury)).

Since Chapman, the Supreme Court has ruled that the "harmless beyond a reasonable doubt" standard is not applicable in the context of habeas corpus proceedings, as contrasted with direct review. Brecht v. Abrahamson, 507 U.S. 619, 637 (1993). In its place, the Supreme Court adopted the standard announced in Kotteakos v. United States, 328 U.S. 750 (1946), which focuses on

whether the error "had substantial and injurious effect or influence in determining the jury's verdict." Id. (quoting Kotteakos, 328 U.S. at 776). Under this standard, a habeas petitioner may obtain collateral review of his constitutional claims, but is not entitled to habeas relief based on trial error unless he can establish that it resulted in "actual prejudice." Brecht, 328 U.S. at 637 (citing United States v. Lane, 474 U.S. 438, 449 (1986)). The court reasoned that

> [o]verturning final and presumptively correct convictions on collateral review because the State cannot prove that an error is harmless under Chapman undermines the States' interest in finality and infringes upon their sovereignty over criminal matters. Moreover, granting habeas relief merely because there is a "'reasonable possibility'" that trial error contributed to the verdict, . . . is at odds with the historic meaning of habeas corpus -- to afford relief to those whom society has "grievously wronged." Retrying defendants whose convictions are set aside also imposes significant "social costs," including the expenditure of additional time and resources for all the parties involved, the "erosion of memory" and "dispersion of witnesses" that accompany the passage of time and make obtaining convictions on retrial more difficult, and the frustration of "society's interest in the prompt administration of justice."

Brecht, 507 U.S. at 637 (internal citations and quotations omitted).

As the first step in a Chapman analysis, the court finds evident from a comparison of the constitutional violations held subject to harmless error with those held subject to automatic reversal, that the instant Ring error fits in the former category. Unlike a defect such as the complete deprivation of

counsel or trial before a biased judge, a Ring error does not affect the framework within which the trial proceeds, but rather only the trial process itself. Indeed, the Supreme Court observed that "while there are some errors to which Chapman does not apply, they are the exception and not the rule.. . . [I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis." Rose v. Clark, 478 U.S. 570, 578 (1986).

Moreover, a Ring error is similar in both degree and kind to a failure to submit an element of a crime to the jury. The Supreme Court has considered this type of failure under the harmless error standard. In Johnson, the trial judge decided the issue of materiality in a perjury prosecution, rather than submit this element to the jury. The Supreme Court recognized that improperly omitting an element from the jury can "easily be analogized to improperly instructing the jury on an element of the offense, an error which is subject to the harmless error analysis." Johnson, 520 U.S. at 469. Similarly, in Neder v. United States, 527 U.S. 1 (1999), the defendant was prosecuted for tax fraud, mail fraud, bank fraud, and wire fraud. The trial court instructed the jury that it need not consider the materiality of any false statement, even though materiality is an element of both tax fraud and bank fraud. The Supreme Court recognized that the judge's failure to instruct and submit the

element of materiality to the jury violated the Sixth Amendment. Id. at 9. Nevertheless, the Supreme Court held that the error did not result in a structural error subject to automatic reversal because it did "not necessarily render [the] criminal trial fundamentally unfair." Id.

Under a harmless error analysis in the context of a habeas proceeding, the court finds that petitioner cannot establish actual prejudice to satisfy Brecht. As discussed above when considering prejudice under the procedural bar doctrine, the judge could not have reached a different conclusion than the jury regarding the existence of the aggravating circumstances beyond a reasonable doubt because the particular aggravators at bar are of an objective nature. See *infra*, Section IV, C, 1. Therefore, the court concludes that the Ring error at bar was harmless and that petitioner is not entitled to have his case remanded to the state for a re-sentencing hearing.[35]

V. CONCLUSION

For the reasons stated, the court denies petitioner's third amended application for writ of habeas corpus. A certificate of probable excuse for an appeal is ordered, and the stay of execution imposed by this court on January 11, 1999 will be continued pending appellate review by the Court of Appeals for

[35]Justice O'Connor opined in her dissent in Ring that "prisoners will be unable to satisfy the standards of harmless error or plain error review." Ring, 536 U.S. at 621.

the Third Circuit. An order shall issue.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

JACK FOSTER OUTTEN,	)	
	)	
	)	
Petitioner,	)	
	)	
v.	)	Civ. No. 98-785-SLR
	)	
ROBERT E. SNYDER and M. JANE BRADY,	)	
	)	
	)	
Respondents.	)	

O R D E R

At Wilmington, this 31st day of March, 2004, consistent with the opinion issued this same day;

IT IS ORDERED that:

1. Petitioner's third amended application for habeas corpus relief is denied. (D.I. 2)

2. The Clerk of Court shall issue a certificate of probable excuse for an appeal to the Court of Appeals for the Third Circuit.

3. The stay of execution imposed by the court on January 11, 1999 is continued pending appellate review by the Court of Appeals for the Third Circuit.

Sue L. Robinson
United States District Judge